State of Michigan

In the

SUPREME COURT

APPEAL BY CERTIORARI TO THE STATE TAX COMMISSION

JOY OIL COMPANY, LTD.,
Plaintiff and Appellant,

vs.

STATE TAX COMMISSION,
Defendant and Appellee.

No. 44,000

RECORD

SHIELDS, BALLARD, JENNINGS & BISHOP,
Attorneys for Appellant.
Business Address:
1400 Olds Tower Bldg.,
Lansing 8, Michigan.

EUGENE F. BLACK, *Attorney General.*
EDMUND E. SHEPHERD, *Solicitor General.*
Business Address:
State Capitol Bldg.,
Lansing, Michigan.

DALE H. FILLMORE, *Corporation Counsel for the City of Dearborn.*
JOEL K. UNDERWOOD, *Deputy Corporation Counsel.*
Business Address:
Dearborn, Michigan.
Attorneys for Defendant and Appellee.

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SUPREME COURT U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948,

No. 223

JOY OIL COMPANY, LTD., PETITIONER,

vs.

STATE TAX COMMISSION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED AUGUST 16, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

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CLAIM OF APPEAL

STATE OF MICHIGAN
IN THE SUPREME COURT

JOY OIL COMPANY, LTD.,
Plaintiff and Appellant,

vs. No. 44,000

STATE TAX COMMISSION,
Defendant.

The Plaintiff claims an appeal from the order of the State Tax Commission sustaining the assessment of the Board of Review of the City of Dearborn of an ad volarem tax upon gasoline stored in the City of Dearborn pending trans-shipment to Canada. Appellant takes an appeal in the nature of certiorari.

Dated: January 16, 1948.

Clayton F. Jennings,
Attorneys for Appellant.
Business Address:
1400 Olds Tower Building,
Lansing, Michigan.

APPLICATION FOR LEAVE TO APPEAL

(TITLE OF COURT AND CAUSE)

Now comes the Joy Oil Company, Ltd., a Canadian Corporation, and makes an application for leave to appeal from an order of the State Tax Commission dated December 3, 1947. The applicant respectfully shows to this Court:

1. That on December 3, 1947, the State Tax Commission notified the applicant that pursuant to a hearing held in Detroit on October 31, 1947, it had denied applicant's appeal claiming exemption from the assessed value of gasoline stored in Dearborn, it appearing to the commission that the assessment had been made in compliance with the law in accordance with the opinion of T. Carl Holbrook, Assistant Attorney General, legal counsel for the Commission. The notice and legal opinion referred to is attached hereto and marked Exhibit "A" and "B".

2. That the reasons and grounds of the desired appeal in said cause are as follows:

(a) That the Commission erred in finding that the gasoline purchased at Grand Rapids, Michigan, by a Canadian corporation, transported by rail to Dearborn, Michigan, where it was stored pending trans-shipment by boat to Canada was subject to tax in the State of Michigan notwithstanding the export-import clause of the United States Constitution.

3. That a statement of the proceedings and facts in said cause so far as they are material is hereto annexed.

4. That applicant seeks leave to appeal by appeal in the nature of certiorari.

Dated: December 15, 1947.

Shields, Ballard, Jennings & Bishop,
By Clayton F. Jennings,
Attorneys for applicant,
Joy Oil Company, Ltd.
Business Address:
1400 Olds Tower,
Lansing 8, Michigan.

CONCISE STATEMENT OF PROCEDURE AND FACTS

On April 1, 1947, the Assessors of the City of Dearborn assessed the gasoline stored in the bulk plant leased by the Joy Oil Company Ltd., of Canada within the City of Dearborn at a valuation of $78,780.00. A protest was made to the Board of Review that the gasoline was not subject to assessment and tax for the reason that it was a commodity in foreign commerce. The protest was denied. Whereupon on June 7, 1947, an appeal was taken to the State Tax Commission for the reason that commodities in foreign commerce coming temporarily to rest in Michigan pending trans-shipment to a foreign country are not subject to local taxation; that the assessment and the tax levied pursuant thereto is contrary to Section 9, sub-paragraph (5) and Section 10, sub-paragraph (2), Article I of the Federal Constitution. On December 3, 1947, the State Tax Commission gave notice denying the appeal. A formal order is not entered by the State Tax Commission in such cases but simply a letter giving notice and reasons for denial is sent to the taxpayer.

The Joy Oil Company, Ltd., is a Canadian corporation not authorized to do business in the State of Michigan. It owns no property within the State of Michigan except that on the assessment date of 1947 it had in storage in Dearborn, Michigan, a large quantity of gasoline awaiting trans-shipment to Canada.

The Joy Oil Company, Ltd. had purchased this gasoline from the Midwest Refineries Company of Grand Rapids, Michigan. At the time of purchase, pursuant to Federal statutes, it furnished to the Midwest Refineries Company an Exemption Certificate duly sworn to. It also furnished Temporary Exemption Certificate,

Form 798 U. S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufacturers Excise Tax Act, and (b) to the carrier in compliance with the Federal Railroad Transportation Act. The purpose was to show that neither of the federal taxes could be assessed against the gasoline in question, since it was a commodity in foreign commerce.

The gasoline was transported from Grand Rapids, Michigan, upon Export Bill of Lading showing the designation to be Canada. Prior to the assessment 50,000 gallons of gasoline were transported by truck over the Ambassador Bridge into Canada until a Federal regulation was issued prohibiting the transportation of inflammable materials over any international bridge. Subsequent to the assessment date all of the gasoline was shipped to Canada by boat, and proof of export has been duly furnished to Midwest Refineries Company, which was necessary so that the gasoline would not be subject to the State Gasoline Tax. When the gasoline arrived by rail at Dearborn it was there unloaded into large storage tanks until such time as a boat could be chartered to trans-ship the gasoline into Canada. This was not possible during the winter months of 1946-1947, for the reason that the Detroit River was frozen and no boats were handling shipments of freight of any kind. It was not until July, 1947, that the Joy Oil Company, Ltd. could charter a boat to transport the gasoline in question. The storage tanks were neither owned by the Joy Oil Company, Ltd., nor the Midwest Refineries Company. They were leased for storage from a third party pending trans-shipment to Canada.

Based upon the assessment the Joy Oil Company, Ltd. was taxed as follows:

General City Tax	$410.96
School Operating Tax	$777.89
School Debt Service Tax	$149.64
Total	$1308.49

all levied in the month of July. As of December 31, 1947, the interest upon that amount is $39.25. There was levied in December, 1947, $478.19 County Operating Tax. The total amount involved being $1825.93.

EXHIBIT "A"

MICHIGAN
STATE TAX COMMISSION
Lansing

December 3, 1947

Mr. Clayton F. Jennings
Shields, Ballard, Jennings & Bishop
1400 Olds Tower Building
Lansing 8, Michigan

Re: Appeal No. 303
Joy Oil Company, Ltd.
1947 Personal Property
Assessment—City of Dearborn

Dear Sir:

You are hereby notified that the State Tax Commission, after investigation and after giving due consideration to all reports and statements submitted at the hearing held in Detroit October 31, 1947, has denied

your appeal claiming exemption from the assessed value of the property described above, it appearing to the Commission that the assessment has been made in compliance with law in accordance with the opinion of T. Carl Holbrook, Assistant Attorney General, our legal counsel. A copy of his opinion is attached hereto for your complete information.

Yours truly,

Arthur E. Hagen
Secretary

AEH/mr
enc.
cc: Dearborn Board of Assessors

State of Michigan
Office of
Eugene F. Black
Attorney General
Lansing

November 12, 1947

State Tax Commission
Lansing, Michigan

Dear Sirs:

The Joy Oil Company, Ltd., is a Canadian corporation, with the stock being held by Margaret Austin, who is the wife of Charles E. Austin who apparently operates and controls the business of the corporation.

Said corporation, at the hearing, admitted the existence of approximately 1,680,000 gallons of gasoline in

three of four tanks located at the Miller Terminal in Dearborn. This gallonage had been accumulated over a fifteen month period from January 1946, during which period, slightly over 10 per cent of the gasoline was drawn out for export to Canada. At the time of assessment, the gallonage in Tank No. 2, which contained 108,000 gallons, was admitted and, therefore, subject to taxation. Tank No. 3 contained no gasoline on April 1st. The gallonage of gasoline in Tank No. 1 was 1,400,000 gallons, and the gallonage in Tank No. 4 was 175,525 gallons, or a total of 1,575,525 gallons. This amount of the gallonage in Tanks Nos. 1 and 4 was not disputed.

The Dearborn Assessor placed an assessment of approximately 5 cents a gallon on the gallonage of gasoline in Tanks Nos. 1 and 4 for a total assessment of $78,780.00.

The corporation purchased this gasoline from Midwest Refineries Company of Grand Rapids, Michigan. At the time of purchase, pursuant to Federal Statutes, it furnished to Midwest Refineries Company an Exemption Certificate duly sworn to. It also furnished Temporary Exemption Certificate, Form 798 U. S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufactures Excise Tax Act, and (b) to the carrier in compliance with the Federal Railroad Transportation Act.

The gasoline was transported from Grand Rapids upon Export Bill of Lading showing the destination to be Canada. The gasoline was shipped by rail from Grand Rapids to Dearborn. It was there unloaded into the tanks, as aforesaid. It is claimed by the corporation that it was thusly stored until a boat could be chartered to trans-ship the gasoline into Canada. It is the further claim that this was not possible to do during the

winter months of 1946-1947, for the reason that the Detroit River was frozen and no boats were handling shipments of freight of any kind. It is further claimed that boats could not be obtained until after July 1, 1947, at which time the gasoline was shipped into Canada. It also developed that 50,000 gallons of gasoline thusly handled, was transported by truck over the Ambassador Bridge, and further shipments were stopped by the fact that such transportation was prohibited of inflammable materials.

It is the contention of the corporation that the City of Dearborn is precluded from collecting a tax on the gasoline in question because of the export clause in the Federal Constitution, which is Article 1, Sections 8, 9 and 10. The pertinent provisions read as follows:

Section 8, sub-paragraph (3):

> "The Congress shall have the power . . . to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Section 9, sub-paragraph (5):

> "No tax or duty shall be laid on articles exported from any state."

Section 10, sub-paragraph (2):

> "No state shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of Congress."

The gasoline in question was purchased in the State of Michigan and remained herein for a considerable

length of time. As a general principle, it is stated that the jurisdiction of a state over tangible personal property having an actual situs in the state is not terminated by the intended shipment thereof out of the state, until such property is actually started on its continuous journey, or at least is irrevocably delivered to a common carrier for through transportation, and is thereby disassociated from the general mass of property in the state. *Diamond Match Co. v. Ontonagon*, 188 U. S. 82; *Coe v. Errol*, 116 U. S. 517; *State v. Taber Lumber Co.*, 101 Minn. 186. Although the intent of the Joy Oil Company, Ltd., may have been that the gasoline involved herein was to be for shipment out of the state, it still was the property of the corporation and in its possession and had not been delivered to a transportation company intransit as an export.

It also has been generally held, that a nondiscriminatory state tax on property located therein is not invalid under the commerce clause as applied to such portion thereof as may thereafter become interstate commerce, even though its exportation may be in contemplation at the time of the incidence of the tax. *Heisler v. Thomas Colliery Co.*, 260 U. S. 245; *Hope Natural Gas Co. v. Hall*, 274 U. S. 284.

The assessment levied in this case is not a tax levied by reason of exportation of the gasoline. This is a general tax laid upon all property alike when it is within the taxing district on assessment day. The fact that this gasoline may be exported at a later time is not controlling, as there is no question but that the ownership of said gasoline is in the corporation and could be diverted from exportation of sale within Michigan at the will of the corporation. If this gasoline was in continuous transit or had been delivered to a carrier, then the contention of the corporation could be upheld. But

it appears from the long time that it remained in the storage tanks and from the fact that the gasoline in one of the storage tanks was admittedly taxable, that all the gasoline of the corporation so located in the group of tanks in the location mentioned, were part of the mass property of the corporation and would, therefore, be subject to ad valorem taxation. Intent to export, standing alone, would not defeat the assessment.

I have noted the opinion of the Attorney General, which you supplied me, which affected the application of the Michigan Gasoline Tax to such gasoline so stored in Michigan. The Michigan Gasoline Tax is imposed to fall on the user of the gasoline for the privilege of using the highways of the State. Until the purchaser is one who would use the highways, the Tax does not affix. I do not believe this opinion would govern the question of assessment of this same gasoline under the ad valorem Tax Laws of this State. The gasoline in question was located within the taxing district for a considerable period prior to assessment date for 1947 Taxes and it was at the same location for a considerable time after assessment date. It was in full control of the corporation during all this time and was not in-transit for exportation. From January 1946 through to assessment day in 1947, only about ten per cent had been withdrawn for exportation. If the gasoline had been placed in the tanks for the purpose of exportation, it could have been placed intransit long before it finally was.

It is the opinion of the writer that the City of Dearborn is not precluded from collecting a Tax from the gasoline in question because of the export clause of the Federal Constitution.

Very truly yours,

T. Carl Holbrook,
Assistant Attorney General.

TCH:dm

ORDER GRANTING LEAVE TO APPEAL

AT A SESSION OF THE SUPREME COURT OF HE STATE OF MICHIGAN, Held at the Supreme ourt Room in the Capitol, in the City of Lansing, on he eighth day of January, in the year of our Lord one housand nine hundred and forty-eight.

Present the Honorable

George E. Bushnell,
Chief Justice,

Edward M. Sharpe,
Emerson R. Boyles,
Neil E. Reid,
Walter H. North,
John R. Dethmers,
Henry M. Butzel,
Leland W. Carr,
Associate Justices.

OY OIL COMPANY, LTD.,
Plaintiff and Appellant.

vs. No. 44,000

TATE TAX COMMISSION,
Defendant.

In this cause an application is filed by plaintiff for ave to appeal from an order of the State Tax Com- ission, and a brief in opposition thereto having been led by defendant and due consideration thereof hav-

ing been had by the Court, It is ordered that the application be and the same is hereby GRANTED.

STATE OF MICHIGAN—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of January, in the year of our Lord one thousand nine hundred and forty-eight.

(SEAL)

Jay Mertz,
Clerk.

COMPLAINT OF PROPERTY ASSESSED VALUATION

MICHIGAN
STATE TAX COMMISSION
LANSING

APPEAL NO. 303 DATE: June 7, 1947

NAME AND ADDRESS OF OWNER:

Joy Oil Company, Ltd.,
a Canadian corporation
Toronto, Canada

AUTHORIZED COUNSEL OR AGENT:

Clayton F. Jennings, of
Shields, Ballard, Jennings & Bishop
1400 Olds Tower,
Lansing 8, Michigan.

The owner and its duly authorized counsel hereby file complaint that assessment has not been made in compliance with law in accordance with Section 3547, Compiled Laws of 1929, as amended, of the Michigan Property Tax Laws on the following described property appearing on the assessment rolls of

City of Dearborn County of Wayne State of Michigan

Gasoline stored in a bulk plant pending trans-shipment to Canada assessed at $78,780.00

The reason for appeal is that commodities in foreign commerce coming temporarily at rest in Michigan pending trans-shipment to a foreign country are not subject to local taxation. The aforesaid assessment con-

travenes Section 9, sub-paragraph 5, and Section 10, sub-paragraph 2, Article I of the Federal Constitution.

I, legal counsel for the property owner, hereby certify that the above facts are true to the best of my knowledge and belief.

Joy Oil Company, Ltd.
By Clayton F. Jennings,
Counsel.

June 10, 1947

Dearborn Board of Assessors
City Hall
Dearborn, Michigan

Re: Appeal No. 303
Joy Oil Company, Ltd.,
Toronto, Ontario, Canada

Gentlemen:

The Commission is in receipt of a complaint filed by the above-named company from the assessed value of their personal property located in the City of Dearborn, which has been accepted for investigation. As complaints from personal property assessments do not require the filing of a formal complaint blank similar to that used for real property, no copy of the complaint accompanies this letter.

This will serve as notice that an appeal from assessment has been filed as prescribed by the Michigan Property Tax Laws. The Commission requests that no taxes be spread against the present assessed value of this property until the investigation has been completed, and when warranted, a hearing on review held,

d proper determination of assessed value made. In-
porated cities which spread a summer tax may pro-
ed to levy taxes on the valuations approved by the
al board of review, providing that refunds for over
yments will be authorized in the event adjustments
valuations are necessary. Statutory notices and or-
rs relative to hearing will be served as provided in
e statutes.

A copy of this letter is being forwarded to the prop-
y owner as formal acknowledgment of the complaint.

Yours truly,

Arthur E. Hagan,
Secretary.

EH/mr

: Mr. Clayton F. Jennings, Counsel
1400 Olds Tower,
Lansing 8, Michigan

October 24, 1947

r. Clayton F. Jennings
ields, Ballard, Jennings & Bishop
00 Olds Tower Building
nsing 8, Michigan

Re: Appeal No. 303
Property Owner Joy Oil Company, Ltd.

ar Sir:

You are hereby notified that the State Tax Commis-
on has ordered a review of the assessment rolls on
ich the property involved in the above appeal is

entered. Hearings on review will be held in Room 1302, Michigan Detroit Office Building (formerly Cadillac Square Building), Detroit, Michigan, on October 29, 30 and 31, 1947.

The above appeal has been scheduled for hearing on Friday, October 31, 1947, at 10:00 (A. M.) Eastern Standard Time.

Yours truly,

Arthur E. Hagen,
Secretary

AEH:mr

TAX EXAMINER'S REPORT

Appeal No. 303 Dearborn, Michigan

Joy Oil Company, Ltd.
A Canadian Corporation

1947 Assessed Valuation $78,780.00

The law firm of Shields, Ballard, Jennings and Bishop of Lansing, Michigan, duly authorized counsel for Joy Oil Company, Ltd., has filed a complaint with the State Tax Commission that the assessment of $78,780.00 placed upon the gasoline located in tanks in the City of Dearborn on April 1, 1947, "has not been made in compliance with law in accordance with Section 3547, C. L. 1929, as amended." The reason for the appeal is that the 1,575,000 gallons of gasoline in question were "commodities in foreign commerce coming temporarily at rest in Michigan pending trans-shipment to a foreign country (Canada) and are not subject to taxation". It is further the contention of com-

sel for appellant that "the aforesaid assessment contravenes Section 9, sub-paragraph 5, and Section 10, sub-paragraph 2, Article 1, of the Federal Constitution".

Pursuant to instructions from the State Tax Commission, a thorough analysis of this matter was made and the following report is hereby submitted:

The Joy Oil Company, Ltd., is a Canadian corporation controlled by one Charles E. Austin, although the latter owns no stock in the corporation, the stock being held by Mrs. Margaret Austin, wife of Charles E. Austin. There is no doubt, however, that Mr. Austin is the guiding hand in the prosecution of this business. At a hearing before the Dearborn Board of Review Mr. Austin appeared in person and admitted the existence of approximately 1,680,000 gallons of gasoline in three or four tanks located at the Miller Terminal in Dearborn. His testimony has further brought out the fact that this gallonage has been accumulated over a fifteen-month period from January, 1946, during which period slightly over 10% of the gasoline was drawn out for export to Canada. It was further pointed out at the aforementioned hearing that of the four gasoline storage tanks located at Miller Terminal in Dearborn the gallonage in Tank No. 2 which contained 108,000 gallons on April 1st was subject to taxation, the latter not having been earmarked by Mr. Austin for transshipment to Canada. It was also pointed out and agreed that Tank No. 3 contained no gasoline on April 1st.

Mr. Austin did not object to the gallonage computation of Dearborn's Assessor who computed the taxable gallonage in Tank No. 1 at 1,400,000 gallons and the gallonage in Tank No. 4 at 175,525 gallons, or a total of 1,575,525 gallons subject to taxation in accordance

with the Dearborn Assessor, the Board of Review and the Corporation Council.

The Dearborn Assessor, therefore, placed an assessment of approximately five cents a gallon on the above gallonage, or a total of $78,780.00.

Following our analysis of the facts in this case we requested the counsel for the Joy Oil Company, Ltd., to file with the State Tax Commission a brief, setting forth all facts as to why, in their opinion, the property in question should not be assessed by the City of Dearborn. At the preparation of this report; no such brief has yet been filed. (Brief is in file).

Our analysis of the facts in this case, fully backed by legal authority, leads us to the conclusion that the gasoline in question was not in interstate commerce and recommend that the State Tax Commission deny this appeal.

Quoting from a recent decision from the Circuit Court for the County of Wayne in the case of Charles E. Austin, Inc., vs. Harry F. Kelly, Secretary of State, (an opinion written by Judge Guy Miller) "When it (the gasoline) crosses the Michigan State line and reaches the company's property in the City of Dearborn, it then comes to rest. The transportation then ceases. When this gasoline arrives within the State of Michigan, the transportation is interrupted and the property transported becomes a part of the general mass of property of plaintiff company and is located in the State of Michigan. The point where the parties diverge in their theories is as to the nature of the transportation. Plaintiff claims that the gasoline, which eventually came into the hands of the Canadian corporation, came there as a result of a continuous act of transportation and that the gasoline was, therefore, always in interstate and foreign commerce and not subject to taxation. The State claims that these ship-

ments into Canada were shipments from the stock on hand in Michigan and that a different method of procedure should have been followed and has been followed in the computation of the tax than would be followed in the case of a single uninterrupted shipment in interstate and foreign commerce. This difference lies in this: If the shipment had merely been interrupted for the purpose of storage awaiting transfer into the tanks of a steamer en route to Canada, no tax would have been assessable or would have been paid upon such gasoline. It would merely have gone into the tanks as a matter of storage in transit. The testimony does not establish that it went into storage in this way in transit. The testimony does establish that it became incorporated in the general mass of plaintiff's property within the State of Michigan when it came to rest in the storage tank. The testimony establishes affirmatively that shipment into Canada was a new transaction."

We follow the reasoning of Judge Miller in the above case and claim a direct analogy between the above case and the matter now before the State Tax Commission. It is our conclusion that mere intent to eventually export this gasoline to Canada is not sufficient to place the goods in the classification of interstate commerce. A leading and illustrative case on this point is Coe vs. Errol, 116 U. S. 517. In this case the plaintiff, a resident of New Hampshire, owned spruce logs drawn down during the winter before from the mountains of New Hampshire to the banks of a stream in the town of Errol, New Hampshire, thence floated down the river in the spring to the State of Maine. It was held in this case by the United States Supreme Court that they were properly appraised for taxation in Errol. The court decided that the products of a state, though intended for exportation and partially prepared for

that purpose, are liable to be taxed like other property at the point where they are so deposited and that they are not exempted from taxation by the owner's preparation to ship them. In this case it was further pointed out that when products of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a railroad, such products are not yet in process of transportation, but they are part of the general mass of property in the state, subject to its jurisdiction, the same way as other property therein. It was emphasized that mere intention to export is not sufficient. The court declared that if the intention to export were sufficient, in many states there would be nothing left to tax but real property.

TEMPORARY EXEMPTION CERTIFICATE

Original No. 1.

Tax on amount paid for transportation of property
Section 3475 Internal Revenue Code

Name—Joy Oil Company Limited
(Shipper or consignee who paid the transportation charges)

Address—3949 Puritan Ave., Detroit, Michigan

certifies that the shipment described below is made pursuant to a contract, order, proposal of purchase, or other written evidence of intention to export, antedating delivery of the shipment to the carrier, and claims exemption from the tax on the amount paid for the transportation of the property which is to be exported, or shipped to a possession of the United States.

Name of Carrier	Property Shipped Commodity Gasoline	Weight
Pere Marquette Railway Company	Car # PTLX 7164	53988 Lbs.
	Car # PTLX 5078	54074 Lbs.

Date Shipped From Point of Origin—Jan. 3, 1946.
Point of Origin of Shipment—Grandville, Michigan.
Port of Exporation—Detroit, Michigan.
Transportation Charge: Date Paid—Jan. 5, 1946.
Amounts Paid—$53.99 and $54.07.

EXCISE TAX — FORM J
(Revenue Act of 1935 amending 1932 Act)

Mid-West Refineries, Inc., Grand Rapids, Michigan
(Heading: Showing name, Address, Etc. of Vendor Company)

EXEMPTION CERTIFICATE

(Purchases for Export or for Resale for export — Section 627 of 1932 Revenue Act as amended)

M. Humble, being duly sworn, says:

That he is the Agent of the Joy Oil Company Limited
(Title) (Name of Vendee)

or is himself of the vendee of the articles specified below, in the accompanying order or on the reverse side hereof; that such articles are purchased to fill existing or future orders for delivery to a foreign destination or possession of the United States, or for resale to another person engaged in the business of exporting who will export the articles: that the articles will be

transported to their foreign destination or shipped to a possession of the United States in due course prior to use or further manufacture and prior to any resale except for export or shipment to a possession of the United States.

It is agreed by the vendor and vendee that proof of actual export as required by Articles 25, 26 and 27 of Regulations 44 revised will be furnished by the vendee within six months or the undersigned will pay the Federal excise tax, including interest, to said vendor on that portion of the articles for which proof of actual export has not been furnished.

(Name of Purchaser) Joy Oil Company Limited

By .....
(Signature of Officer or Agent)

Toronto, Ontario, Canada
(Address of Purchaser)

Gasoline Purchase February 1946

(Verification)

UNIFORM STRAIGHT BILL OF LADING
ORIGINAL — NOT NEGOTIABLE
PERE MARQUETTE RAILWAY COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, at Alma, Mich., 31 Jan. 1946 from Mid-West Refineries, Inc. the property described below * * * * * *

Consigned to Joy Oil Co. Ltd. % Miller Road Terminal
Destination—Detroit. State of Mich. County of
Route—P M
Delivering Carrier ..... Car Initial PTLX
Car No. 7516

No. Pkgs.	Description of Articles, Special marks, and exceptions	Weight	Class or Rate	Check Column
	8193 Shell Gals Gasoline (Housebrand) Inflammable Placards Applied	54,074	6.6	96
	Net Gals 8377			
	Temp 28			
	Seal 143227			
	For Export to Canada			
	Shippers Load & Count.			

Mid-West Refineries, Inc. Shipper. L. L. Loesel Agent
Per L. Fandell

PERE MARQUETTE RAILWAY COMPANY

Consignee—Joy Oil Co. LTD Freight Bill No. 34898
Detroit, Mich. 1-22-46

Destination % Miller Rd. Terminal
Route PM

Waybilled from—RGE 545 Alma Mich.
Waybill Date and No.: Date—1-19-46. No.—13053.
Full Name of Shipper—Midwest Refineries Inc.
Car Initials and No.—GATX 18746.

Number of Packages, Articles and Marks
10103 Gals Housebrand Gasoline
Inflammable Plac Appld
at 6 6 Per Gal.
SLC for Export to Canada

Weight	Rate	Freight	Advances	Total
66680	09	6001		6001

PM6755 15/A/

EXCISE TAX — FORM K

(Rev. Act of 1935 amending 1932 Act)

TO MID-WEST REFINERIES, INC.

PROOF OF EXPORT

(Section 627 of 1932 Revenue Act, as amended)

M. P. Austin, being duly sworn, says that he is an Officer of the Joy Oil Company Limited, the vendee, or is himself the vendee, and purchased from Mid-West Refineries, Inc., the articles specified below, or on the

reverse side hereof, tax-free under an exemption certificate for export or for resale for export; that said articles (exceptions, if any, noted below) were in fact exported in due course prior to use, further manufacture or resale in the United States except for export; that a copy of the export bill of lading (or other evidence of export consisting of):

Dominion of Canada Customs Warehouse Entry No. 28356 E. dated February 9, 1946

Dominion of Canada Customs Warehouse Entry No. 29699 E. dated March 2, 1946

Dominion of Canada Customs Warehouse Entry No. 30664 E. dated March 16, 1946

Dominion of Canada Customs Warehouse Entry No. 31836 E. dated March 30, 1946

Dominion of Canada Customs Warehouse Entry No. 2387 E. dated April 20, 1946

Dominion of Canada Customs Warehouse Entry No. 4311 E. dated May 4, 1946

Dominion of Canada Customs Warehouse Entry No. 5261 E. dated May 11, 1946

Dominion of Canada Customs Warehouse Entry No. 7192 E. dated May 25, 1946

Dominion of Canada Customs Warehouse Entry No. 9225 E. dated June 8, 1946

Dominion of Canada Customs Warehouse Entry No. 11224 E. dated June 22, 1946

Dominion of Canada Customs Warehouse Entry No. 12811 E. dated July 6, 1946

Dominion of Canada Customs Warehouse Entry No. 13843 E. dated July 16, 1946

Dominion of Canada Customs Warehouse Entry No. 37963 J. dated July 29, 1947

Dominion of Canada Customs Warehouse Entry No. 58185 J. dated August 22, 1947

covering the exportation thereof is available for inspection by Government officers at the office of Joy Oil Company Limited at (Street No.) 67 Carlton Street, in the City of Toronto, Ontario.

Joy Oil Company Limited

By M. P. Austin
(Officer or Agent)

(Verification)

THIS CERTIFICATE COVERS:

Purchases of gasoline shipped during January and February 1946, by Mid-West Refineries, Inc., from Alma and Grandville, Michigan, in tank cars said to contain 1,447,893 United States gallons of gasoline.

CERTIFICATION BY THE MICHIGAN STATE TAX COMMISSION IN THE MATTER OF THE APPEAL OF JOY OIL COMPANY, LTD.

STATE OF MICHIGAN
IN THE SUPREME COURT

JOY OIL COMPANY, LTD.,
a Canadian corporation,

vs.

STATE TAX COMMISSION,

WHEREAS, In pursuance of the application for Leave to Appeal, as filed in this Court by the Joy Oil Company, Ltd., a Canadian corporation, and hearing to be had on same by this Court; and in compliance with Court Rule; and

In furtherance of providing complete Record of all proceedings had before the Michigan State Tax Commission, said State Tax Commission, through its Secretary, hereby certifies the following records, documents, briefs, and all instruments affecting the action and Order of the said State Tax Commission entered on December 3, 1947, upholding the 1947 Personal Property Assessment of the City of Dearborn;

Arthur E. Hagen, Secretary of the Michigan State Tax Commission, having complete custody and charge of the various appeals filed with the State Tax Commission, and particularly, the appeal of the Joy Oil Company, Ltd., on its 1947 Personal Property Assessment made by the City of Dearborn on gasoline in storage from January 1946, to July 1946, does hereby certify and return to this Court all the records, documents and briefs as submitted to the State Tax Commission during the hearing of the appeal of said Joy Oil Company, Ltd., included in this return, known as Appeal No. 303 of the State Tax Commission for the year 1947, are the following documents:

Complaint of Property Assessed Valuation of Joy Oil Company, Ltd., dated June 7, 1947, addressed to the State Tax Commission;

Letter, under date of June 7, 1947, from the law firm of Shields, Ballard, Jennings & Bishop, addressed to the Michigan State Tax Commission, which accompanied the Complaint;

Copy of letter under date of June 10, 1947, from the Secretary of the State Tax Commission addressed to the Dearborn Board of Assessors, with copy sent to Mr. Clayton F. Jennings, Attorney for Joy Oil Company;

Notice of Hearing of the appeal of Joy Oil Company, Ltd., as sent to counsel for Joy Oil Company, dated October 24, 1947;

Report of Tax Examiner of the State Tax Commission to the State Tax Commission, re: the Appeal of Joy Oil Company, Ltd.;

Work Sheets of Examiner for State Tax Commission;

Photostatic copy of File No. 306,985, Wayne County Chancery;

Brief on Behalf of Joy Oil Company, Ltd.;

Letter of September 19, 1947, from Shields, Ballard, Jennings & Bishop;

Brief on Behalf of the City of Dearborn;

Letter dated November 12, 1947, from Joel K. Underwood, Office of Corporation Counsel, City of Dearborn;

Reply Brief on Behalf of Joy Oil Company, Ltd., enclosing exhibits;

Letter dated November 20, 1947, from Shields, Ballard, Jennings & Bishop, which transmitted Appellant's Reply Brief;

Opinion of T. Carl Holbrook, Assistant Attorney General, as attorney for State Tax Commission;

Determination of the State Tax Commission denying the appeal of the Joy Oil Company, Ltd.;

Letter dated December 3, 1947, to Shields, Ballard, Jennings & Bishop from the Secretary of the State Tax Commission, notifying them of the action and Order of the State Tax Commission, re: the Appeal of Joy Oil Company, Ltd.; and copy of this was forwarded to Dearborn Board of Assessors.

At the scheduled hearing of this Appeal, there is no dispute as to the facts and same are fully set forth in the Briefs.

This Certificate made at the offices of the State Tax Commission in the State Office Building in the City of Lansing, Ingham County, Michigan, this 30th day of December, A. D. 1947.

STATE TAX COMMISSION

(SEAL)

s/d Arthur E. Hagen,
Secretary.

DECISION OF THE MICHIGAN SUPREME COURT

STATE OF MICHIGAN
SUPREME COURT

JOY OIL COMPANY, LTD.,
Plaintiff and Appellant,

vs.

STATE TAX COMMISSION,
Defendant and Appellee.

BEFORE THE ENTIRE BENCH.

BOYLES, J.

The question here for decision is whether a quantity of gasoline stored in tanks in the City of Dearborn pending transshipment to Canada is liable for an ad valorem tax. The facts are not in dispute and, as hereinafter shown, control decision.

On December 29, 1945, the appellant Joy Oil Company, Ltd., a Canadian corporation not authorized to do business in Michigan, purchased 1,500,000 gallons of gasoline from the Mid-West Refineries, shipped it by rail from Grandville and Alma to itself as consignee, at Detroit, and stored it in large storage tanks in Dearborn pending transshipment to Canada. The bills of lading from the Pere Marquette railroad were each marked "For export to Canada." However, the bills of lading were not through bills from Grandville and Alma to Toronto, Canada, but the shipments were consigned to appellant at Detroit, the place of delivery being within a few feet of the boundary line between Detroit and Dearborn, and the storage tanks being near the railroad siding but over the line in Dearborn. All of the bills of lading were issued in January, 1946, the shipments were made beginning in January and accumulated until some time in February when the final delivery was made to appellant at said storage tanks leased by it located in the City of Dearborn.

On April 1, 1947, all of the above gasoline was in said tanks with the exception of a small amount which had previously been exported to Canada by truck over the Ambassador bridge. Further movement of gasoline across said bridge was stopped by the authorities and there was a delay of about 18 months before said gasoline in storage was transported to Canada. Commencing in July, 1947, the gasoline was transported to Canada by boat.

On April 1, 1947, the city of Dearborn assessed said gasoline for ad valorem taxes, and the tax now amounts to $1,825.93. Appellant appealed from said assessment to the board of review of the city of Dearborn, which sustained the tax; whereupon appellant appealed to the Michigan State tax commission, where the tax was again

upheld. On leave granted Joy Oil Company, Ltd., now prosecutes an appeal to this Court in the nature of certiorari from said decision of the State tax commission.

It is the claim of the appellant that the gasoline in question was a commodity in foreign commerce, and that the city of Dearborn is precluded from imposing the tax under the export-import clause of the United States Constitution.

Summarizing the factual situation, said gasoline was shipped intrastate by rail to appellant in Dearborn, stored there about 18 months in leased tanks, then transshipped by boat to Canada, and on April 1, 1947, after the gasoline had been stored in Dearborn about 15 months the city assessed it for ad valorem taxes. Was it exempt, as a commodity in foreign commerce?

The pertinent provisions of the United States Constitution are as follows:

"The Congress shall have power * * *

"(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" Art. 1, Sec. 8.

"No tax or duty shall be laid on articles exported from any State." Art. 1, Sec. 9 (5).

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Art. 1, Sec. 10 (2).

In support of its claim that the gasoline in question was exempt from taxation by the city of Dearborn, appellant relies on the principles of law laid down in the following cases:

Spalding & Bros. vs. Edwards, 262 U. S. 66 (67 L. Ed. 865);

Carson Petroleum Co. vs. Vial, 279 U. S. 95 (73 L. Ed. 626);

Richfield Oil Corp. vs. State Board of Equalization, 329 U. S. 69 (91 L. Ed. 123).

But the facts in the case at bar do not fit into the principles of law announced in the above decisions. In the Spalding Case, *supra*, the transportation was practically continuous from the time the shipment of merchandise was started by rail until the merchandise was placed on board ship at seaboard to continue the transportation to the purchaser in Venezuela. Spalding, the shipper (corresponding to the Mid-West Refineries in the case at bar), was directed to deliver the merchandise to the Atlantic & Caribbean Steam Navigation Company in New York, and did so. The collector of internal revenue in New York levied an excise tax on the merchandise shipment and the court set the tax aside. In so doing, the court said:

> "The very act (of the shipper) that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port."

Such was not the situation in the case at bar, where the gasoline was shipped by the refineries by rail for delivery to the appellant at Detroit, and the continuity of transportation was interrupted there by placing the gasoline in storage tanks where it remained for approximately 18 months before appellant procured ship transportation for Canada. Under these circumstances, marking the railroad bills of lading "For export to Canada" did not make the transportation by railroad and ship a continuous one within the circumstances of the Spalding Case.

The question whether the State in which the goods are stored may levy a tax depends upon whether there is a continuity of transportation. In turn, this becomes a question of fact, and depends upon the circumstances of each individual case. In the Carson Petroleum Co. Case, *supra,* relied upon by appellant, oil was purchased by the Carson Company in various States, transported by railroad tank cars, and unloaded into storage tanks at St. Rose, a few miles above New Orleans, for shipment to foreign ports. The rail shipments were on an export rate, lower than the domestic rate. The oil was of a grade made especially for export. The tanks and equipment at St. Rose were made especially for unloading oil from tank cars and loading it aboard ships for export. No oil was sold there and the only business conducted was transfer of the oil from tank cars into storage tanks for reloading into ships. The journey was made as continuous as possible, depending on the quantity of oil on hand and the capacity of ships available for export. The court found:

> "On account of the demurrage charges on tank cars, as well as on steamships, it would be impracticable to carry on the export business by any other

method than by storing the oil in large storage tanks as the train loads of oil arrive, and shipping from the accumulation when the ships arrive. The oil is shipped from the storage tanks in the same condition in which it was received from the tank cars without being treated in any way. The oil is never kept on hand at St. Rose any longer than is necessary. The quantity on hand is always awaiting either the arrival of a ship or the accumulation of a sufficient quantity to load a ship.

* * *

"The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit."

After discussing many cases the court held that the transportation in that case was continuous, and in its conclusion referred to other decisions with the following comment:

"The quickness of transshipment in both cases was the chief object each exporter plainly sought. In both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad, and for no other purpose."

In the Richfield Oil Corp. Case, *supra*, mainly relied upon by appellant, the facts likewise distinguish the case from the one at bar. The Richfield Oil Corporation was engaged in producing and selling oil in California. It transported its oil by pipeline from its refinery to its storage tanks at seaboard and there pumped the oil into vessels in foreign commerce. Its delivery was "to the

order of the Naval Secretary, Navy Office, Wellington, into N. Z. Naval tank steamer R.F.A. 'Nucula' at Los Angeles, California," to be consigned to the naval officer-in-charge at Auckland, New Zealand. The State of California levied a tax on the oil under the State retail sales tax act. The United States supreme court held that the tax was unconstitutional under article 1, Sec. 10 of the United States Constitution hereinbefore quoted. The continuity of the movement by pipeline and by shipload to the foreign port was not substantially interrupted.

In the case at bar, the destination of the gasoline on the original rail shipments was Detroit, Michigan. If the rail shipments had been billed to Toronto, Canada, the transportation might have been continuous by rail across or under the Detroit river, to Canada. The break of the continuous shipment at Dearborn was for the profit and convenience of the appellant, to use ship movement to Toronto at a lower rate. The gasoline remained in storage in Dearborn for about 15 months, until on tax day, April 1, 1947, it was assessed by the city for ad valorem taxes. It was not transshipped by boat to Canada for approximately three months thereafter. There was no continuity of transportation at Detroit or Dearborn which would require exemption from taxation under the decisions relied upon by appellant.

In *Coe vs. Errol*, 116 U. S. 517, often referred to as the leading case, logs cut during the winter in New Hampshire were hauled to a river town in that State, to be floated by river to a place in Maine. They were detained in New Hampshire by low water, and while still there were assessed for taxes. The court upheld the tax, saying:

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an intrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

* * *

"The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question.

* * *

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

Counsel for appellant relies on cases holding that the ment is in interstate (ergo, foreign) transportation n delivery is made by the shipper for transportation rail to another State. These decisions might apply to case at bar if the original delivery of gasoline had n made by bill of lading for Toronto, Canada. On the trary, the gasoline was billed for shipment by rail to roit as the destination. The notation on the bills of ing "For export to Canada" did not change the desti- ion. As said in *Minnesota vs. Blasius*, 290 U.S. 1, at e 9:

"The 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transit'. *Carson Petroleum Co. vs. Vial*, 279 U.S. 95, 101.

"If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's

power to tax it. *Coe vs. Errol*, 116 U.S. 517; *Diamond Match Co. vs. Ontonagon*, 188 U.S. 82.

It must be admitted that excerpts from many cases could be quoted in support of appellant's contention here. But the fundamental rule of law in these cases is that decision depends upon what is meant by continuity of transportation, and in turn this depends upon the facts of each case. Under the circumstances of the case at bar, we conclude that there was no continuity of transportation from the point of shipment to destination in foreign commerce. The gasoline in Dearborn on April 1, 1947, was subject to ad valorem taxation.

Affirmed, with costs.

STATE OF MICHIGAN
THE SUPREME COURT

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing contains the transcript of the record from the Circuit Court for the County of Wayne as prepared and printed under the Rules of the Supreme Court of Michigan, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the Supreme Court of Michigan, except the full captions, titles and endorsements omitted in pursuance of the Rules of the Supreme Court of Michigan, in a certain cause in said Supreme Court wherein Joy Oil Company, Ltd. was Appellant, and State Tax Commission was Appellee, No. 44,000, as full, true and complete as

e originals of the same remain on file and of record in
y office.

IN TESTIMONY WHEREOF, I hereunto sub-
scribe my name and affix the seal of the
Supreme Court of the State of Michigan, at
the office in the City of Lansing, Michigan,
this 11th day of August, A.D. 1948.

Jay Mertz, Clerk of the
Supreme Court of Michigan.

SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the
Supreme Court of the State of Michigan is granted, and
the case is transferred to the summary docket.

And it is further ordered that the duly certified copy
of the transcript of the proceedings below which accom-
panied the petition shall be treated as though filed in re-
sponse to such writ.

Office - Supreme Court, U. S.
FILED
AUG 16 1948
CHARLES ELMORE CROPLEY
CLERK.

No. 223

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JOY OIL COMPANY, LTD.,
a Canadian corporation,
Plaintiff and Petitioner,

vs.

STATE TAX COMMISSION,
Defendant and Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

CLAYTON F. JENNINGS,
Attorney for Petitioner.
Business Address:
1400 Olds Tower Bldg.,
Lansing 8, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JOY OIL COMPANY, LTD.,
a Canadian corporation,
Petitioner and Appellant Below,

vs.

STATE TAX COMMISSION,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joy Oil Company, Ltd., a Canadian corporation, hereby respectfully prays for a writ of certiorari addressed to the Supreme Court of the State of Michigan directing it to certify to this Honorable Court for review and determination the record in a certain cause, No. 44,000, entitled "Joy Oil Company, Ltd., vs. State Tax Commission". The transcript of the record in the case, including the proceedings in the Supreme Court of the State of Michigan, is furnished herewith in accordance with the Rules of this Court.

By its decision rendered on May 16, 1948, the Supreme Court of the State of Michigan held that under the general taxation laws of the State of Michigan, an ad valorem tax could be assessed against the petitioner on a quantity of gasoline stored in tanks in the City of Dearborn, Michigan, pending trans-shipment to Canada. The decision of the Supreme Court of Michigan is not yet reported.

Dearborn at a valuation of $78,780.00. A protest was made to the Board of Review that the gasoline was not subject to assessment and tax for the reason that it was a commodity in foreign commerce. The protest was denied. Whereupon on June 7, 1947, an appeal was taken to the State Tax Commission for the reason that commodities in foreign commerce coming temporarily to rest in Michigan pending trans-shipment to a foreign country are not subject to local taxation; that the assessment and the tax levy pursuant thereto was contrary to Section 9, sub-paragraph (5), and Section 10, sub-paragraph (2), Article I of the United States Constitution. On December 30, 1947, the State Tax Commission gave notice denying the appeal (3, 5).

The Joy Oil Company, Ltd., is a Canadian corporation not authorized to do business in the state of Michigan. It owns no property within the state of Michigan except that on the assessment date, April 1, 1947, it had in storage at Dearborn, Michigan, a large quantity of gasoline awaiting trans-shipment to Canada. The Joy Oil Company, Ltd., had purchased 1,500,000 gallons of gasoline from the Midwest Refineries Incorporated of Grand Rapids, Michigan. At the time of purchase, pursuant to Federal statutes, it furnished to the Midwest Refineries Incorporated an Exemption Certificate, duly sworn to, and also a Temporary Exemption Certificate Form 798 U. S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufacturers Excise Tax, and (b) to the carrier in compliance with the Federal Railroad Transportation Act. The purpose was to show that neither of the Federal taxes could be assessed against the gasoline in question since it was a commodity in foreign commerce, thereby the Joy Oil Company, Ltd., benefited by the lower export freight rates (3, 4, 20, 21). The gasoline was transported from Grandville and Alma, Michigan, upon export bills of lading marked "For export to Canada" (23, 24). The total amount of this gasoline was in storage in Dearborn on April 1, 1947, except 50,000 gallons which had been transported by truck over the Ambassador Bridge into Canada until a Federal regulation was issued prohibiting the transportation of any inflammable materials over any in-

ternational bridge. The gasoline remained in storage for about fifteen months because of inability to charter a boat to transport the gasoline to Canada. In July 1947 a boat was chartered and all of the gasoline in question was transported to Canada (4). Excise Form K, Proof of Export, was furnished to Midwest Refineries, Incorporated, the vendor (24, 26).

Following the sustaining of the tax as assessed by the Board of Review of the City of Dearborn by the State Tax Commission, petitioner appealed by certiorari to the Supreme Court of Michigan (1). Leave to appeal was granted. The Supreme Court by its decision of May 16 affirmed the action of the State Tax Commission. It is this decision of the Supreme Court which petitioner seeks to have reviewed.

REASONS RELIED UPON FOR THE GRANTING OF A WRIT OF CERTIORARI

The discretionary powers of this Court are invoked upon the following grounds, being those included among the grounds enumerated in Rule 38 of the Rules of this Court:

First. The Supreme Court of Michigan decided the case in a manner repugnant to Article I, Section 10, of the United States Constitution.

Second. The Supreme Court of Michigan decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

WHEREFORE, your petitioner respectfully prays that this Court grant a Writ of Certiorari under Judicial Code, Section 237a, as amended by the Act of February 13, 1925, and the Act of January 31, 1928, to be issued out of and under the seal of the Court, directed to the Supreme Court of the State of Michigan, to remove therefrom for review here the record in the cause therein pending, No. 44,090, wherein your petitioner is appellant, and the respondent appellee, that the opinion and judgment of the Supreme Court of Michigan may be reviewed by this

Court, and that the petitioner have such other and further relief in the premises as to this Court may seem equitable and just.

Clayton F. Jennings,
Attorney for Petitioner and
Appellant Below.
Business Address:
1400 Olds Tower Building,
Lansing 8, Michigan.

Dated: July 19, 1948.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Export-Import Clause of the Constitution of the United States clearly prohibits a state, or any of its subdivisions, from levying any tax on commodities exported, except such as may be necessary for executing the state inspection laws.

This being an ad valorem tax under the general tax laws of the State of Michigan, the exception is not involved. Because there is a single exception, no other qualification of the absolute provision against taxation by a state or its subdivisions was intended.

It was the theory of the Michigan Supreme Court that an interruption of the journey to a point in a foreign country defeated the theory of a continuous journey and that at the point of interruption the commodity was subject to an ad valorem tax. That Court stated in the course of its opinion:

> "If the rail shipments had been billed to Toronto, Canada, the transportation might have been continuous by rail across or under the Detroit River to Canada."

In effect it held that it would be necessary to have a through bill of lading from the point of the original shipment to the point in Canada which was the destination of the shipment. That would require a through shipment by rail. The owner elected to ship by rail to the Lake Port

and Dearborn storage tanks and then by water from Dearborn to Toronto or other points in Canada. A through bill of lading is not possible when there is a transfer from rail to boat. Later in the opinion the Court said:

> "There was no continuity of transportation at Detroit or Dearborn which would require exemption from taxation under the decisions relied upon by appellant."

The Court then concluded its opinion by saying:

> "Under the circumstances of the case at bar, we conclude that there was no continuity of transportation from the point of shipment to destination in foreign commerce."

It is clear that the Supreme Court of the State of Michigan interpreted the cases of this Court to hold that if there was a break in the transportation by transferring the commodity from a rail shipment to a tank and then from a tank to a boat that there was such a lack of continuity of transportation as to render the commodity subject to ad valorem taxation. Such is not the tenor of the Import-Export Clause of the Federal Constitution.

The decision is squarely in conflict with the case of *Carson Petroleum Co. vs. Vial*, 279 U. S. 96, 73 L. Ed. 626. It is on this decision that appellant placed its principal reliance. The Michigan Supreme Court placed principal reliance upon *Coe vs. Errol*, 116 U. S. 517.

In the case of *Carson Petroleum Co. vs. Vial*, supra, it was pointed out that in the case of *Coe vs. Errol* that there were two lots of logs involved. One lot of logs was cut in Maine to be floated down river to Lewiston, Maine, but after starting on the trip the one lot was detained for a *season* in New Hampshire by low water. It was held that this lot of logs was free from local taxation in New Hampshire because they had begun the interstate trip and the cause of detention was to be found in the necessities of the passage, and the trip back to Maine, which was held to be continuous. Evidently the Michigan Supreme Court in reading the decision confused this holding with

the holding on the other lot of logs which had not started its interstate journey.

The Michigan Supreme Court placed emphasis upon the fact that the gasoline was detained in Dearborn, Michigan over a period of fifteen months but the detention was because of the failure of the transportation system, due to a shortage of boats following the war, much the same as the failure of transportation in *Coe vs. Errol* referred to in the *Carson Petroleum Co.* case. In the cited case many other cases were cited which in principle involved the situation before us, although such cases might to some extent be distinguishable upon the facts. Among those was *Champlain Realty Co. vs. Brattleboro*, 260 U. S. 366. In that case logs were gathered in Vermont for a destination in New Hampshire. The court held the logs were not taxable in Vermont, though detained for a considerable time by a boom at Brattleboro to await subsidence of high water in the Connecticut river.

Also the case of *Railroad Commission vs. Worthington*, 225 U. S. 101, where coal from the Ohio mines intended for transportation on the Great Lakes and stored for *some weeks or months* on docks in Cleveland for delivery beyond the lakes was held to be subject to interstate rates. In that case it was said:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment enroute does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive."

The Court gave the above quotation with approval in *Carson Petroleum Co. vs. Vial*, supra. That paragraph so approved is almost a complete refutation of the entire theory of the Michigan Supreme Court as expressed in its opinion. There was also referred to the case of *Southern*

P. Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498. In that case cotton oil cake and meal destined for export was bought by the intending exporter in Texas, Oklahoma, and Louisiana. It was shipped to him on bills of lading and waybills showing the point of origin in those states and the destination at Galveston. The purchases were made for export, there being no consumption of the products at Galveston. His sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. There was some processing carried on at Galveston. The Court in deciding the case said:

> "The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston, or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under Coe v. Errol, supra, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation'."

Therefore, contrary to the decision of the Michigan Supreme Court, when the gasoline was delivered to the Pere Marquette Railway Co. at Grandville and Alma, Michigan, all bills of lading marked for "Export", it was delivered to a carrier for transportation to a foreign destination.

From that point onward it was at all times a commodity in foreign commerce.

Also in *Carson Petroleum Co. vs. Vial* was cited the case of *Texas & N. O. R. Co. vs. Sabine Tram Co.*, 227 U. S. 111. The question in that case was whether the rates charged on shipments of lumber on local bills of lading from one point in Texas to another, but destined for export, were intrastate or foreign commerce. The exporter purchased the lumber from other mills in Texas with which to supply its sales in part. It did not know when any particular car of lumber left the starting point into which ship or to what particular destination the contents of the car would ultimately go, or on which sale it would be applied; this not being found out until its agent inspected the invoice mailed to and received by him after the shipment. The lumber remained after arrival at the shipping port in the slips or on the dock until a ship chartered by the exporter arrived, then the exporter selected the lumber suited for that cargo and shipped it to its destination. This court held that the shipments to the point of shipment from other points of Texas were in interstate and foreign commerce and should pay rates accordingly. This Court quoted with approval from the decision as follows:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps of its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

The Court went on to hold that such would not give it a local character. Therefore, the language of the Michigan Supreme Court is refuted that the shipments should have been billed from the point of origin in Michigan to Toronto, Canada, to make the journey continuous. The Court also pointed out that the absence of a definite foreign destination did not alter the character of the shipments; that there was not a break in the sense of the Interstate Commerce Law in the continuity of transportation of lumber to foreign countries by the delay and its transshipment at Sabine.

The circumstances in the case at bar have no essential differences from the circumstances in the case of *Carson Petroleum Co. vs. Vial*. That case is full authority for holding in the case at bar the gasoline was a commodity in foreign commerce and not subject to an ad valorem tax. The decision of the Michigan Supreme Court is in direct conflict with that decision by this Court, and calls for review by this Court of the case at bar.

"It is clear from the above case, upon which we rely, that a through bill of lading is not necessary to continuity of the foreign journey. We can also conclude from that case and the cases cited therein that an interruption of the foreign journey, particularly by storing the commodity for a period of time pending transshipment to the foreign country does not destroy the continuity of the journey, unless the commodity was stored within the United States for such a long period of time that the intent to export was abandoned. In the case at bar, while due to necessities of transportation, the storage extended over months but the commodity was actually transported to the foreign country. The intent to export was never abandoned nor could it have been presumed to have been abandoned.

The decision of the Supreme Court of Michigan is likewise in conflict with the cases of *A. G. Spalding & Bros. vs. William H. Edwards, Collector of Internal Revenue*, 262 U. S. 66, 67 L. Ed. 865, and *Richfield Oil Corp. vs. State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80.

The *A. G. Spalding & Bros.* case involved a Federal tax on baseball bats and balls sold by the manufacturer. A

firm in a foreign country ordered a New York Commission House to buy a quantity of bats and balls for their account. The New York Commission House placed the order with the manufacturer, instructing it to deliver the packages to an exporting carrier in New York for shipment overseas. The goods were delivered to the carrier and an export bill of lading was issued. In due course the goods were shipped overseas. The issue was whether the sale was a step in exportation. In the course of the opinion written for the Court by Mr. Justice Holmes, it was said:

> "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. * * * Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Company (agents), and that, theoretically, they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Company was solely for the purpose of Delgado & Compania, and for their account and risk. Theoretical possibilities may be left out of account. * * *"

In the case at bar, it can be equally said that when the gasoline was delivered to the Pere Marquette Railroad Company at Grandville and Alma, Michigan, from which point it was shipped by rail to Dearborn, Michigan, title to the gasoline passed and had the transaction been a domestic one it would have made the appellant subject to a tax, but for the purpose of transportation to a foreign country which was actually carried out and the shipment being upon export bill of lading, it became immune from the ad valorem tax assessed against it.

In the *Richfield Oil Corp.* case, the State of California assessed a sales tax upon gross transactions against gaso

line while it was in storage tanks pending transshipment to New Zealand. The California Supreme Court sustained the tax against the claim that it was repugnant to Article I, Section 10, Clause 2, of the Constitution of the United States. This Court reversed the opinion of the Supreme Court of California in a very exhaustive opinion written by Mr. Justice Douglas which gives a careful review of all cases pro and con involving the question at issue. In the course of the opinion it was said:

> "The questions remain whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it.
>
> "The requirement that foreign commerce be involved * * * is met, for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem. There are a few decisions of the Court under Article I, Section 10, Clause 2, which illuminate the problem."

The Court then reviewed many cases involving or touching upon the questions, among them being the *A. G. Spalding Bros.* case. In conclusion Mr. Justice Douglas said:

> "The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. * * *.
>
> "We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional."

Both of the above cases are clearly in point to the case at bar and the language of the decisions could be easily paraphrased in deciding the case at bar.

The reliance of the Supreme Court of Michigan upon the case of *Minnesota vs. Blasius*, 290 U. S. 1, does not

aid in a proper decision of the case. That case is not in point neither on the facts nor in principle. It was a case in which George Blasius, a trader in livestock at the St. Paul Union Stockyards, St. Paul, Minnesota, purchased eleven head of cattle which were shipped there from a point outside of the State of Minnesota and the consignors had no intent to transport the cattle to any other place than St. Paul, nor did they have any intent that such cattle should be transported to any other place after the sale. Blasius did not have any specific intent to ship them outside of the State of Minnesota, although that may have been the future course in the matter. In fact seven cattle were shipped out of Minnesota on the day of the purchase and four on the following day. This Court in reversing the Supreme Court of Minnesota held that where merchandise is brought into a town from outside of a state and stored in advance of sales and orders taken for the merchandise are filled therefrom, the business is not interstate but local commerce and laws imposing taxes thereon are invalid as interferring with interstate commerce. Aside from the point that the facts are distinguishable from the case at bar, there was involved in that case the Commerce Clause of the United States Constitution which calls for entirely different principles of law than the Export-Import Clause which is involved in the case at bar. It was pointed out in the *Richfield Oil Corp.* case as follows:

> "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. * * * But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was or had ever been an import or export. * * * Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. * * * But the scope of the

limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. * * * It seems clear that we cannot write any such qualifications into the Import-Export Clause. It prohibits every state from laying 'any' tax on imports or exports 'without the consent of Congress.'"

The above quotation from the *Richfield Oil Corp.* case clearly renders entirely inapplicable to the case at bar *Minnesota vs. Blasius, supra.*

CONCLUSION

We believe that in the foregoing brief we have raised a substantial Federal question which entitles this case to review by this Court. We believe that the decision of the Supreme Court of Michigan is in conflict with decisions of this Court, particularly *Carson Petroleum Co. vs. Vial*, supra, *A. G. Spalding & Bros. vs. Edwards*, supra, and *Richfield Oil Corp. vs. State Board of Equalization*, supra, which, under the Federal Judicial Code, Section 237(a) and the Rules of this Court, is sufficient ground for review.

Respectfully submitted,

Clayton F. Jennings

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

JOY OIL COMPANY, LTD.,
a Canadian corporation,
Plaintiff and Appellant,

vs.

No. 223

STATE TAX COMMISSION,
Defendant and Appellee.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR JOY OIL COMPANY, LTD.

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AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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OPINION BELOW

The opinion of the Supreme Court of the State of Michigan is reported in 321 *Michigan Reports* 335 (R. 33-42).

JURISDICTION

The Order of the State Commission was affirmed by the Supreme Court of Michigan on May 18, 1948 (R. 33-42). The Petition for a Writ of Certiorari was filed August 16, 1948, and was granted October 11, 1948. The

jurisdiction of this Court is conferred by Section 237(a) *Judicial Code* (28 U.S.C.A. Section 344(a), 861(a) F.C.A. Title 28, Sec. 344(a)).

STATEMENT OF THE CASE

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

On April 1, 1947, the Assessors of the City of Dearborn assessed the gasoline stored in bulk plants leased by the Joy Oil Company, Ltd., of Canada within the City of Dearborn at a valuation of $78,780.00. A protest was made to the Board of Review that the gasoline was not subject to assessment and tax for the reason that it was a commodity in foreign commerce. The protest was denied. Whereupon on June 7, 1947, an appeal was taken to the State Tax Commission for the reason that commodities in foreign commerce coming temporarily at rest in Michigan pending trans-shipment to a foreign country are not subject to local taxation; that the assessment and the tax levy pursuant thereto was contrary to Section 9, sub-paragraph (5), and Section 10, sub-paragraph (2), Article I of the United States Constitution. On December 30, 1947, the State Tax Commission gave notice denying the appeal (3, 5).

The Joy Oil Company, Ltd., is a Canadian corporation not authorized to do business in the state of Michigan. It owns no property within the state of Michigan except that on the assessment date, April 1, 1947, it had in storage at Dearborn, Michigan, a large quantity of gasoline awaiting trans-shipment to Canada. The Joy Oil Company, Ltd., had purchased 1,500,000 gallons of gasoline from the Midwest Refineries Incorporated of Grand Rapids, Michigan (3).

At the time of purchase, pursuant to Federal statutes, it furnished to the Midwest Refineries Incorporated an Exemption Certificate, duly sworn to, and also a Temporary Exemption Certificate Form 798 U. S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufacturers Excise Tax, and (b) to the carrier in compliance with the Federal Railroad Transportation Act (4).

The purpose was to show that neither of the Federal taxes could be assessed against the gasoline in question since it was a commodity in foreign commerce, thereby the Joy Oil Company, Ltd., benefited by the lower export freight rates (3, 4, 20, 21).

The gasoline was transported from Grandville and Alma, Michigan, upon export bills of lading marked "For export to Canada" (23, 24). The total amount of this gasoline was in storage in Dearborn on April 1, 1947, except 50,000 gallons which had been transported by truck over the Ambassador Bridge into Canada until a Federal regulation was issued prohibiting the transportation of any inflammable materials over any international bridge (4).

The gasoline remained in storage for about fifteen months because of inability to charter a boat to transport the gasoline to Canada. In July 1947 a boat was chartered and all of the gasoline in question was transported to Canada (4). Excise Form K, Proof of Export, was furnished to Midwest Refineries Incorporated, the vendor (24, 26).

Following the sustaining of the tax as assessed by the Board of Review of the City of Dearborn by the State Tax Commission, petitioner appealed by certiorari to the Supreme Court of Michigan (1). Leave to appeal was granted. The Michigan Supreme Court by its decision of May 16, 1948 affirmed the action of the

State Tax Commission. It is this decision of the Michigan Supreme Court which petitioner seeks to have reviewed and reversed.

QUESTION PRESENTED

Is a commodity in foreign commerce which temporarily comes at rest between a prior rail shipment and a subsequent boat shipment into a foreign country subject to a local ad valorem tax while it is stored by the river front in a municipality pending such transshipment?

SPECIFICATION OF ERROR TO BE URGED

The Supreme Court of the state of Michigan erred in holding that the commodity was subject to an ad valorem tax because the storage at Dearborn, Michigan for fifteen months was a break of the continuous shipment and since there was no continuity of transportation from the point of shipment to the destination in foreign commerce, it was not exempt from local taxation under the Export-Import Clause of the Constitution of the United States.

SUMMARY OF ARGUMENT

1. When the seller in Michigan and the buyer in Canada intend that the commodity should be exported, and that intention had been put into effect by shipping to the port on a bill of lading marked "For export to Canada" followed by storage at or near the port of export by reason of convenience of the transportation process, its temporary detention does not remove it from foreign commerce.

A. G. Spalding & Bros., vs. William H. Edwards, Collector of Internal Revenue, 262 U. S. 66;

Carson Petroleum Co. vs. Vial, 279 U. S. 95;

Baldwin vs. Patk. Exchange, 263 U. S. 291.

2. The essential character of the commerce, not the fact of local or through bill of ladings, or a rebilling or reshipment enroute, or a plurality of carriers, determines whether it is foreign commerce.

Railroad Commission vs. Worthington, 225 U. S. 101;

Southern P. Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498.

3. The shipment of the gasoline to Dearborn by rail and storage there pending trans-shipment to Canada was but a step in its transportation to its real and ultimate destination in a foreign country.

Texas & N. O. R. Co. vs. Sabine Tram. Co., 227 U. S. 111.

4. The City of Dearborn is precluded from imposing an ad valorem tax on the gasoline in question under Export-Import Clause of the Constitution of the United States. (Article I, Section 10). Such a tax is unconstitutional.

Richfield Oil Corp. vs. State Board of Equalization, 329 U. S. 69 (67 Sup. Ct. 156, 91 L. Ed. 80).

ARGUMENT

Is a Commodity in Foreign Commerce which Temporarily Comes at Rest Between a Prior Rail-Shipment and a Subsequent Boat-Shipment into a Foreign Country Subject to a Local Ad Valorem Tax While it is Stored by the River Front in a Municipality Pending Such Transhipment?

As applied to the case at bar, the question presented might be stated: Is gasoline sold by refineries in Michigan to a Canadian corporation and shipped by rail to a point which is a port for shipment upon the Great Lakes and stored there in tanks pending transshipment by boat to Canada tax exempt under the Export-Import Clause of the Constitution of the United States? The Export-Import Clause of the Constitution of the United States is Section 10, sub-paragraph 2 of Article I and reads:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imports, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

This being an ad valorem tax under the general tax laws of the state of Michigan, the exception is not involved. Because there is a single exception, no other qualification of the absolute provision against taxation by a state or its subdivisions was intended. No question is raised here as to the constitutionality of the tax laws, but in the case at bar, the general tax laws of Michigan were applied in a way that is unconstitutional.

The tax levied is unconstitutional under the above quoted section of the United States Constitution.

It was the theory of the Michigan Supreme Court in its decision that an interruption of the journey to a point in a foreign country defeated the theory of a continuous journey and at the point of interruption within the state of Michigan the commodity was subject to an ad valorem tax. In the course of its opinion, the Michigan Supreme Court said:

> "If the rail shipments had been billed to Toronto, Canada, the transportation might have been continuous by rail across or under the Detroit River to Canada" (39).

In effect it held that it would be necessary to have a through bill of lading from the point in Michigan to the point in Canada which was the destination of the shipment. That would require a through shipment by rail. The purchaser elected to ship by rail to the Lake Port located at Dearborn, Michigan, a suburb of Detroit, and there accumulate the gasoline in its storage tanks in sufficient quantity for a boatload and then ship over the Great Lakes from Dearborn to Toronto or other points in Canada. A through bill of lading is not possible when there is a transfer from rail to boats not owned by the railway company.

In the case of *Railroad Commission vs. Worthington*, 225 U. S. 101, coal from the Ohio mines intended for transportation on the Great Lakes was stored for *some weeks or months* on docks in Cleveland for delivery beyond the lakes. The question was whether the coal was subject to interstate rates. In the course of the opinion so holding it was said:

> "Ordinarily the question whether particular commerce is interstate or intrastate is determined by

> what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment enroute does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bill of lading that is decisive."

The quoted paragraph of the opinion completely refutes the above stated theory of the Supreme Court of Michigan.

It may be stated as a general principle that where the seller and buyer intend that the gasoline should be exported and comes to rest temporarily at or near the port of export by reason of convenience of the transportation process, its temporary detention would not remove it from foreign commerce.

> *Buiderup vs. Pathe Exchange*, 263 U. S. 291, 309, (68 L. Ed. 308, 316).

In the case at bar, the Joy Oil Company, Ltd., a Canadian corporation, was the purchaser. As pointed out in the statement of the case, it procured and furnished all the usual export papers issued by the custom authorities. This procedure gave to the commodity the essential character of the commerce which was foreign commerce.

The Supreme Court of Michigan further said in holding the gasoline subject to an ad valorem tax in Michigan:

> "There was no continuity of transportation at Detroit or Dearborn which would require exemption from taxation under the decisions relied upon by appellant" (7).

The Court then concluded its opinion by saying:

> "Under the circumstances of the case at bar, we conclude that there was no continuity of transportation from the point of shipment to destination in foreign commerce" (42).

It is clear that the Supreme Court of the State of Michigan interrupted the cases of this Court to hold that if there was a break in the transportation by transferring the commodity from a rail shipment to a storage tank and then from a storage tank to a boat that there was such a lack of continuity of transportation as to render the commodity subject to ad valorem taxation Such is not the tenor of the Export-Import Clause of the United States Constitution, or the cases of this Court interpreting that clause.

In the case of *Southern P. Terminal Co. vs. Interstate Commerce Commission*, 219 U. S. 498, cotton oil cake and meal destined for export was bought by the intending exporter in Texas, Oklahoma, and Louisiana. It was shipped to him on bills of lading and waybills showing the point of origin in those states and the destination at Galveston. The purchases were made for export, there being no consumption of the products at Galveston. His sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. There was some processing carried on at Galveston. The Court in deciding the case said:

> "The manufacture or concentration on the wharves of the terminal company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the

substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston, or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose. The case, therefore, comes under Coe v. Errol, supra, where it is said that goods are in interstate, and necessarily as well in foreign commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation'."

Therefore, contrary to the decision of the Michigan Supreme Court, when the gasoline was delivered to the Pere Marquette Railway Co. at Grandville and Alma, Michigan, all bills of lading marked for "Export"; it was delivered to a carrier for transportation to a foreign destination. From that point onward it was at all times a commodity in foreign commerce. In the cited case it was not important that the way bills showed the destination to be Galveston, and it is not important in the case at bar that the way bills showed the destination to be Detroit, Michigan, although the Michigan Supreme Court seems to make a point of that fact (39).

This case also stands for the proposition, contrary to the holding of the Supreme Court of the State of Michigan, that a through bill of lading is not essential to make the character of the commerce foreign, and also that the storage of the commodity at the port is not such an interruption of the continuity of the journey as to render the commodity subject to local control or taxation. The gasoline in question was purchased by the

Canadian corporation to supply a demand in the Dominion of Canada. Transshipment upon the Great Lakes after delivery by rail to a port on the Great Lakes was the best and most economical way of delivering the gasoline into Canada.

In the case of *Texas & N. O. R. Co. vs. Sabine Tram Co.*, 227 U. S. 111, the question was whether the rates charged on shipments of lumber on local bills of lading from one point in Texas to another, but destined for export, were intrastate or foreign commerce. The exporter purchased the lumber from other mills in Texas with which to supply its sales in part. It did not know when any particular car of lumber left the starting point into which ship or to what particular destination the contents of the car would ultimately go, or on which sale it would be applied; this not being found out until its agent inspected the invoice mailed to and received by him after the shipment. The lumber remained after arrival at the shipping port in the slips or on the dock until a ship chartered by the exporter arrived, then the exporter selected the lumber suited for that cargo and shipped it to its destination. This court held that the shipments to the point of shipment from other points of Texas were in interstate and foreign commerce and should pay rates accordingly. This Court said:

> "The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped, and to give it a various character by the steps of its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the in-

terior of a state. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

The Court went on to hold that such would not give it a local character. Therefore, the language of the Michigan Supreme Court is refuted that the shipments should have been made from the point of origin in Michigan to Toronto, Canada, to make the journey continuous. The Court also pointed out that the absence of a definite foreign destination did not alter the character of the shipments; that there was not a break in the sense of the Interstate Commerce Law in the continuity of transportation of lumber to foreign countries by the delay and its transshipment at Sabine.

Although it is not necessary to the decision of the Michigan Supreme Court, it made a point of the fact that the gasoline remained in storage in Dearborn, Michigan for about fifteen months and that it was not transshipped by boat to Canada for approximately three months after April 1, 1947, the date of the assessment. In *Railroad Commission vs. Worthington*, supra, the coal from the Ohio mines was stored on docks in Cleveland for some weeks or months, but more in point is the case of *Coe vs. Errol*, 116 U. S. 517. In that case there were two lots of logs involved. One lot of logs was cut in Maine to be floated down river to Lewiston, Maine, but after starting on the journey one lot was detained for a *season* in New Hampshire by low water. In fact it was stipulated in the case that the timber cut in Maine over a period of years has always lain over one season, being about a year, in the Androscoggin River in the state of Maine, either in Errol or nearby towns, and that in accordance with the custom that the particular lot

of logs had lain over in Errol since the spring or summer before the taxation. In holding that these logs were not subject to taxation, this Court said:

> "This question does not present the predicament of goods in course of transportation through a state, although detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the state of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation."

It is to be seen that in the opinion the Court spoke both of the logs that had begun the interstate journey and were free from taxation and as to the logs that had not yet started the interstate journey. The first were held to be free from taxation and the latter subject to local taxation, but it was entirely immaterial that the logs were held in the river because of low water for a period in excess of a year. In the cited case apparently the logs were cut in the woods during the winter months of the year. They were then gathered and placed in the river and floated down to a point, such as Errol, in the spring months of the year. After they reached that point apparently the water was too low to continue the journey to the final destination in New Hampshire. Therefore, the logs were held in the river until high water the following spring.

In the case at bar during the winter of 1946, the gasoline was placed in tank cars of the Pere Marquette Division of the C. & O. Railway Company, and by that act delivered to the Canadian corporation. The gaso-

line at that point became the property of the Canadian corporation. The rail journey was then made from Grandville or Alma, Michigan to the Lake Port at Dearborn where it was placed in storage tanks until such time as a sufficient quantity would be gathered to make up a boatload to be transported to Canada when the Great Lakes were open for navagation in the spring, but it happened that in the navigation season of 1946 that there was such a shortage of tank steamers that the appellant was not able to charter a boat to take the gasoline over the Great Lakes into Canada. Due to the necessity of this transportation process, it was necessary to hold the gasoline in storage until the following summer when a boat was chartered and the gasoline all shipped to Canada. On the facts there is no distinction between the case of *Coe vs. Errol*, supra, and the case at bar in regard to the commodity that had already commenced the journey which was to take it out of the state.

The Supreme Court of Michigan rested its decision upon the case of *Coe vs. Errol*, supra but in so doing, it must have considered only the portion of the case that dealt with the logs which had not yet started its interstate journey.

In the foregoing portion of this brief we have answered the definite grounds upon which the Supreme Court of the State of Michigan upheld the tax. The remaining question is whether in the case at bar there is an export within the meaning of the constitutional provision and if so whether this tax was a prohibitive impost upon it. Under the decisions of this court it appears to be clear that these questions must be answered in the affirmative. In reaching a negative answer the Supreme Court of Michigan is squarely in conflict with the cases of *A. G. Spalding & Bros. vs. Edwards*, 262 U. S. 66 L. Ed. 865); *Carson Petroleum Company vs.*

Vial, 279 U. S. 96 (73 L. Ed. 626) and *Richfield Oil Corporation vs. State Board of Equalization*, 329 U. S. 69 (91 L. Ed. 80).

The case of *A. G. Spalding & Bros. vs. William H. Edwards, Collector of Internal Revenue*, supra, is undoubtedly the leading case upon this subject. There was involved a shipment of sporting goods from the United States to South America. This was accomplished through the purchase of goods in this country by an agent who received title from Spalding Bros. and transmitted the goods to the South American buyers. The Court held that the State of New York could not tax the goods in question inasmuch as they were in the course of interstate commerce from the time of purchase until their actual shipment. The defendant contended that inasmuch as an agent had received title to the goods in this country, that, therefore, the goods were subject to local taxation. Justice Holmes in his opinion said:

> "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export, and with the direction to the foreign port upon the goods. The expected and accomplished effect of the act was to start them for that port. * * * Getting the bill of lading stands no differently from putting the goods on board ship. Neither does it matter that the title was in Scholtz & Company (agents), and that, theoretically, they might change their mind and retain the bats and balls for their own use. There was not the slightest probability of any such change and it did not occur. The purchase by Scholtz & Company was solely for the purpose of Delgado & Compania, and for their account and risk. Theoretical possibilities may be left out of account. * * *"

It has been pointed out that the appellant purchased the gasoline from the Midwest Refineries Company of

Grand Rapids and Alma, Michigan, from which points it was shipped by rail to Dearborn, Michigan. It was shipped on bills of lading marked for export (23, 24). Under the above quotation this act passed the title and had the transaction been a domestic one it would have made the applicant subject to the tax, but with the direction of a foreign sale upon the Bill of Lading it became tax immune.

As has been pointed out in the statement of facts, the bills of lading upon which the Joy Oil Company, Ltd., gasoline was shipped showed that the gasoline was destined to be exported to Canada. In the cited case the same precedure was followed as in the case at bar in the shipment of the gasoline in question. The case is full authority for the proposition here urged.

A case very similar to the case at bar on the facts is that of *Carson Petroleum Company vs. Vial*, 279 U. S. 95 (73 L. Ed. 626). The opinion in that case was delivered by Mr. Chief Justice Taft. The facts involved a situation where the Carson Petroleum, a corporation of Delaware, purchased oil from out of the state and by a system of tanks and pumps stored the oil in the State of Louisiana. The tanks and equipment were at St. Rose, a few miles above New Orleans, and no oil was sold at St. Rose, except that which was exported. The only business conducted there was in the unloading of oil from railroad tank cars into storage tanks and the loading of the oil from the storage tanks abroad the tankers for shipment to England, France and other ports. The oil was bought by the Carson Petroleum from refiners in the Mid-continent Field, comprising Kansas, Oklahoma, and Texas, and was shipped to St. Rose, Louisiana, in railroad tank cars consigned to the Carson Petroleum company. The shipments are not on through bills of lading, but on an export rate, which is lower than the domestic rate which is the situation in

the case at bar. The Carson Petroleum Company took orders for cargoes of oil from the foreign buyers, who chartered the ships to transport the oil from St. Rose to the foreign ports. The company always has orders on hand in excess of the quantity of oil at St. Rose, and buys the oil for the purpose of filling these orders. The oil in the railroad tank car is not segregated or assigned or destined to any particular cargo or shipment abroad, but is pumped into the large storage tanks, having the capacity of many tank cars, and is held in the tanks until a ship arrives, or until a sufficient quantity of oil is accumulated to make a cargo. The State of Louisiana attempted to impose a tax upon oil while stored in Louisiana pending trans-shipment to England.

The defendant's contention as in the case at bar, was that they were two separate shipments, the one which ended when the tank cars arrived and were unloaded at St. Rose and the foreign shipment which began when the oil was loaded abroad ship for the foreign port. It was contended that the oil was stored in the tanks at St. Rose under the protection of the state and local government and it was subject to state and local taxes, even though intended and prepared for export. Justice Taft stated as follows:

> "The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit. * * *"

He continued as follows:

> "The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already

> begun in good faith and temporary interruption of the passage is reasonable, and in furtherance of the intended transportation, as in the Champlain Co. case. Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee, who, by the agreement of sale, divided with him the responsibility for the continuous interstate transportation. * * *."

Such is the answer to the contention of the appellee here and the findings of the Michigan Supreme Court.

Justice Taft, in concluding in favor of the plaintiffs, made this statement:

> "* * * The use of the tanks at the point of trans-shipment cannot be distinguished from the storing of the lumber on the docks or in the slips between them till the vessel to carry it should be ready. The quickness of the trans-shipment in both cases was the chief object each exporter plainly sought. In both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose. No lumber or oil was sold there but that to be exported. There was no possibility of any other business there. Whatever hesitation might be prompted in deciding this case, if the Crain Case stood alone, the effect of the decisions of this court since is such as to make it inapplicable to the case before us."

In the present case it is also true, as in the cited case, that the tanks and equipment were at Dearborn convenient to the river front and no gasoline was sold at Dearborn at that point except that which was exported; that the only business conducted by the Joy Oil Company, Ltd., at Dearborn, was the unloading of the gasoline from the railroad tank cars into storage tanks and the loading of the gasoline from the storage tanks aboard

a tanker for shipment to Canada. The Michigan Supreme Court contended that these were two separate shipments, but in the cited case Chief Justice Taft overrules a like contention. Therefore, the cited case is full authority against the contention made here by the Michigan Supreme Court.

Incidentally in this case Mr. Chief Justice Taft referred to the case of *Coe vs. Errol*, supra, in the following language:

> "The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit. The leading case is that of Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, in which Mr. Justice Bradley for this court laid down the principles that should be applied. It was a case of floating logs. There were two lots, one where the logs were cut in Maine, and were floated down the Androscoggin on their way to Lewiston, Maine but after starting on the trip were detained for a season in New Hampshire by low water. It was held that they were free from local taxation in New Hampshire because they had begun the interstate trip and the cause of detention was to be found in the necessities of the passage and trip back to Maine, which was held to be continuous. This ruling which was by the state court of New Hampshire was approved by this court. But, in respect to the other lot, this court found that the logs were gathered in New Hampshire in what the court termed an "entrepot," looking to ultimate transportation to another state, but that when taxed they had not started on their final and continuous journey, and hence were not in interstate commerce and were taxable."

The recent case of *Richfield Oil Corporation vs. State Board of Equalization, supra,* presents an exhaustive opinion in clear and strong language on this subject. The facts of the case were that the Richfield Oil Corporation

was engaged in producing and selling oil in California. It entered into a contract with the New Zealand Government for the sale of oil. The price was f.o.b. Los Angeles. Delivery was to the Naval Secretary, Navy Office, Wellington, New Zealand. The oil was consigned to the Naval-Officer-In-Charge at New Zealand. The oil was carried by pipe line from the refinery in California to storage tanks in the harbor where the naval tank steamer appeared to receive the oil. When the steamer had docked and was ready to receive the oil, it was pumped from the storage tanks into a naval tank steamer at Los Angeles. Customary shipping documents were given the master, including a bill of lading which designated the Richfield Oil Corporation as shipper and consigned the oil to the designated Naval Officer in New Zealand. The oil company filed with the Collector of Customs its shipper's export declaration. The State of California assessed a retail sales tax against the Richfield Oil Corporation on such shipments measured by the gross receipts from the transaction. The tax was paid under protest, and a claim for refund was filed asserting that the levy of the tax violated the provisions of Article I, Section 10, Clause 2, of the *Federal Constitution*. Mr. Justice Douglas in the opinion of the Court pointed out that it was not necessary to pursue the validity of the tax under the Commerce Clause, Article I, Section 8, Clause 2, but that the tax was unconstitutional under the Import-Export Clause, Article I, Section 10, Clause 2. In the course of the opinion he said:

> "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved. The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad.

Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery, the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland port. The means of shipment are unimportant so long as the certainty of the foreign destination is plain.

"It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5, of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel. As the meaning of 'export' is the same under that Clause and the Import-Export Clause (citing cases), the same result follows here."

And further, on page 132:

"The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves. That is true of the constitutional prohibition against federal taxes on exports. (citing cases). What was said there (p. 13, United States v. Hvoslef, 237 U S 1, 59 L. Ed. 813, 35 S. Ct. 459, Ann. Cas. 1916A 286) is equally applicable here. 'If it meant no more than that, the obstructions to exportation which it was the purpose to prevent, could readily be set up by legislation nominally conforming to the constitutional restriction but in effect over-riding it.' And see Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 710, 53 S. Ct. 373.

> "We conclude that the tax which California has exacted from appellant is an impost upon an export within the meaning of Article I, Section 10, Clause 2, and is therefore unconstitutional."

An analysis of these last three cases establishes that the character of the commodity was that the gasoline in question was a commodity in foreign commerce. The tax that the City of Dearborn attempts to levy on the gasoline, which at all times was destined for export and in the process of export, is an impost upon an export within the meaning of Article I, Section 10, Clause 2 of the *Constitution of the United States* and is therefore an unconstitutional levy.

In the case at bar the Supreme Court of the State of Michigan relied upon cases involving interstate commerce and particularly upon taxes that were upheld because the interstate movement had not commenced at the time the tax was levied, but regardless of that fact it is not necessary in the case at bar to pursue the validity of the tax under the Commerce Clause, Article I, Section 8, Clause 2 of the *United States Constitution*. In that regard Mr. Justice Douglas said in the last cited case:

> "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under The Commerce Clause (citing cases). But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had even been, an import or export (citing cases). Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limita-

tion upon the power of the States, even in absence of action by Congress."

The commodity at issue here would only have been taxable while it was in the hands of the Midwest Refineries Company of Grand Rapids and prior to the time it had been delivered to a common carrier for transportation. Under the facts of the present case from the time it left Grand Rapids or Alma in railroad tank cars it became tax immune under the Export-Import Clause of the *United States Constitution*. The Assessment and levy made by the City of Dearborn was not constitutional. The purchase of gasoline by a foreign buyer and delivery made to a rail common carrier as a part of the journey in foreign commerce upon an export bill of lading was immune from local taxation, even though there would be a break in that journey for the purpose of storing the commodity to suit the convenience of further transportation.

CONCLUSION

The assessment and levy made by the City of Dearborn should be held invalid and the decision of the Supreme Court of Michigan reversed.

Respectfully submitted,

Clayton F. Jennings,
Attorney for Appellant.

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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

JOY OIL COMPANY, LTD.,
a Canadian corporation,
Plaintiff and Petitioner,
vs.
STATE TAX COMMISSION,
Defendant and Respondent.

(Companion case to No. 224, Charles E. Austin, Inc., v. Secretary of State, 321 Mich. 426.)

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the court below is officially reported as *Joy Oil Company, Ltd.* v. *State Tax Commission*, 321 Mich. 335.

II.

COUNTER-STATEMENT ON JURISDICTION

The petitioner invokes the jurisdiction of this court under Sectoin 237 of the Judicial Code, as amended, (Title 28 U.S.C.A. Sec. 344 (a), 861 (a), 8 FCA, Title 28, Sec. 344 (a)) in which the peitioner claims that the judgment sought to be reviewed is a final judgment; that application for writ of certiorari is made within the time limit prescribed by the rules of this court and that the issue presents a Federal question in that an ad valorem tax is assessed on gasoline in storage within the State of Michigan, and further claiming that the commodity is in foreign commerce by reason of export bills of lading having been issued at the time of purchase marked "For export to Canada" (23, 24); that the gasoline after coming to rest in the City of Dearborn (taxing unit) was to be shipped to Canada by boat, petitioner claiming the transaction to be exempt from taxation on the ground of being in foreign commerce.

It is the position of the defendant and respondent that:

(1) The Michigan Supreme Court did not decide a Federal question, substantial or otherwise, in that.

(a) The gasoline was shipped between points within the State of Michigan in an intrastate shipment, whereby the gasoline did not leave the State

of Michigan from the time of purchase by the petitioner until the receipt of the gasoline by the petitioner in its sforage tanks owned by it in the City of Dearborn, and that the gasoline was held in storage for a period of fifteen months for the convenience of the shipper pending his determination of continuation of the shipment from Dearborn, Michigan, to Canada.

(b) The determination by the Supreme Court of the State of Michigan did not require the court to pass upon a Federal question; that no Federal question was determined as appears by the opinion of the court as stated at the outset:

> "The facts are not in dispute and, as hereinafter shown, control decision." (33)
>
> Note 49, *Judicial Code*, Section 237.

(c) The gasoline did not become a commodity in foreign commerce until July, 1947, at which time it was transported by the petitioner to its final place of destination in Canada; that the determination of this fact by the lower court does not make it appear that the United States Supreme Court would have jurisdiction as there is no Federal question presented for decision which was necessary to the determination of the cause and that there was no Federal question actually decided. The judgment was rendered without deciding a Federal question.

> Note 49, *Judicial Code*, Section 237, and cases therein cited.

(d) The determination of the questions of fact in this case is exclusively within the province of the Michigan Supreme Court.

(2) If a Federal question could be said to have been involved, such question was decided fully in accord with the decisions of the United States Supreme Court involving the import-export clause of the United States Constition and the cases relied upon by petitioner namely:

Carson Petroleum Company v. *Vial*, 279 U.S. 95, 73 L. Ed. 626;
Richfield Oil Corporation v. *State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80;
A. G. Spaulding & Bros. v. *William H. Edwards, Collector of Internal Revenue*, 262 U. S. 67, 67 L. Ed. 865.

In the instant case the facts clearly show that the storage of the gasoline in the storage tanks within the City of Dearborn was for the convenience of the owner. During a period of more than fifteen months no act was instituted by the shipper, petitioner, to continue the movement or shipment of the gasoline in furtherance of the claimed foreign commerce movement. The facts show to the contrary, that there had been a stoppage in transit for the sole convenience of the shipper for the sole purpose of obtaining a convenient means of transportation.

III.

COUNTER-STATEMENT OF FACTS

Since the function of this Court

> ". . . is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, . . . nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court," (Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, at p. 97).

we cannot accept the "Brief Statement of Facts" as set forth in plaintiff's petition for writ of certiorari. Respondent, therefore, sets forth the following statement of the case, based upon findings of fact of the Michigan Supreme Court in *Joy Oil Company, Ltd.* v. *State Tax Commission,* 321 Mich. 335 (33 through 42 inclusive) and in particularly as follows: (33, 34, 35)

> "The question here for decision is whether a quantity of gasoline stored in tanks in the City of Dearborn pending transshipment to Canada is liable for an ad valorem tax. The facts are not in dispute and, as hereinafter shown, control decision.
>
> "On December 29, 1945, the appellant Joy Oil Company, Ltd., a Canadian corporation not author-

ized to do business in Michigan, purchased 1,500,000 gallons of gasoline from the Mid-West Refineries, shipped it by rail from Grandville and Alma to itself as consignee, at Detroit, and stored it in large storage tanks in Dearborn pending transshipment to Canada. The bills of lading from the Pere Marquette railroad were each marked 'For export to Canada.' However, the bills of lading were not through bills from Grandville and Alma to Toronto, Canada, but the shipments were consigned to appellant at Detroit, the place of delivery being within a few feet of the boundary line between Detroit and Dearborn, and the storage tanks being near the railroad siding but over the line in Dearborn. All of the bills of lading were issued in January, 1946, the shipments were made beginning in January and accumulated until some time in February when the final delivery was made to appellant at said storage tanks leased by it located in the City of Dearborn.

"On April 1, 1947, all of the above gasoline was in said tanks with the exception of a small amount which had previously been exported to Canada by truck over the Ambassador bridge. Further movement of gasoline across said bridge was stopped by the authorities and there was a delay of about 18 months before said gasoline in storage was transported to Canada. Commencing in July, 1947, the gasoline was transported to Canada by boat.

"On April 1, 1947, the city of Dearborn assessed said gasoline for ad valorem taxes, and the tax now amounts to $1,825.93. Appellant appealed from said assessment to the board of review of the city of Dearborn, which sustained the tax; whereupon appellant appealed to the Michigan State tax com-

mission, where the tax was again upheld. On leave granted Joy Oil Company, Ltd., now prosecutes an appeal to this Court in the nature of certiorari from said decision of the State tax commission.

"It is the claim of the appellant that the gasoline in question was a commodity in foreign commerce, and that the City of Dearborn is precluded from imposing the tax under the export-import clause of the United States Constitution.

"Summarizing the factual situation, said gasoline was shipped intrastate by rail to appellant in Dearborn, stored there about 18 months in leased tanks, then transshipped by boat to Canada, and on April 1, 1947, after the gasoline had been stored in Dearborn about 15 months the city assessed it for ad valorem taxes. Was it exempt, as a commodity in foreign commerce?"

In the case of *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, 91 L. Ed. 1946, Mr. Justice Rutledge, in delivering the opinion of this Court stated in reference to a determination of fact by the lower court:

"Those rulings are conclusive upon us."

IV.

ARGUMENT

It is the position of the defendant and respondent that the petition for writ of certiorari should be denied for the following reasons:

1. Plaintiff and petitioner fails to show in the petition for writ of certiorari that this Court has jurisdiction as required by Judicial Code, Section 237, Title 28, Section 344, Note 49, and the cases therein cited, and especially *Warren W. Wilson, et. al.*, appellants v. *Otho A. Cook*, Commissioner of Revenues, 327 U. S. 474,498; 90 L. Ed. 793. Mr. Chief Justice Stone delivered the opinion of this Court and stated, 90 L. Ed. 799, as follows:

> "Under Section 237 of the Judicial Code we are without jurisdiction . . . unless there was 'drawn in question' before the Supreme Court . . . 'the validity of a statute' of the state, 'on the ground of its being repugnant to the Constitution, . . . or laws of the United States.' The purpose of this requirement is to restrict our mandatory jurisdiction on appeal (citing cases), and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds (citing cases), or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it (citing cases). This jurisdictional requirement is satisfied only if the record shows that

the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state (citing cases), or has in fact been decided by it (citing cases), and that its decision was necessary to the judgment.

* * *

"As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States (citing cases). That court's opinion, while holding that the 'tax law' was applicable to 'persons severing timber from lands of the United States in the national forest,' does not indicate that plaintiffs raised there, or that the court passed upon, the validity of the statute as applied. The court considered only the validity of 'the tax', not that of the statute.

"In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or 'the right to collect the tax' which has been levied, or show that the validity of the tax alone has been considered. (citing cases). For 'the mere objection to an exercise of authority under a statute whose validity is not attacked, cannot be made the basis' of an appeal (citing cases). It is for this reason that we have held that an appeal will not be sustained where there has been only an attack

upon a tax assessment (citing cases), or, as here, upon a 'tax' (citing cases), or upon the attempt to collect a tax (citing a case).

"Since plaintiffs' attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under Section 237 of the Judicial Code, 28 USCA Section 344, 8 FCA title 28, Section 344. Treating the appeal as a petition for writ of certiorari, as required by Section 237 (c) of the Judicial Code, we grant certiorari, as we did in No. 329. We can consider only the federal questions passed upon by the state Supreme Court."

2. There is no Federal question of substance decided by the lower court. As has been pointed out, the lower court in determining this case decided the question of fact involved, i.e., that the commodity was not in foreign commerce and was not exempt from taxation based upon the facts presented concerning continuity of transit or shipment and that such determination of fact was the controlling determinative issue and did not involve determination of a Federal question, the Federal Constitution, the Constitution of the State of Michigan, the import-export clause or the commerce clause as claimed by the petitioner, and that there was not "drawn in question" the validity of a statute of the state on the ground of its being repugnant to the constitution, treaties, or laws of the United States.

V.

CONCLUSION

It, therefore, appears that a Federal question of substance is not involved in this case, and therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

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EDMUND E. SHEPHERD, *Solicitor General of the State of Michigan,*

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Brief by JOEL K. UNDERWOOD, *Deputy Corporation Counsel of the City of Dearborn.*

Joel K Underwood

Attorneys for Defendant and Respondent.

Dated: August 26, 1948.

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Supreme Court of the United States

October Term, 1948

No. 223

JOY OIL COMPANY, LTD., Petitioner,

vs.

STATE TAX COMMISSION

On Writ of Certiorari to the Supreme Court of the State of Michigan

BRIEF FOR STATE TAX COMMISSION

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Supreme Court of the United States

October Term, 1948

No. 223

JOY OIL COMPANY, LTD., Petitioner,

vs.

STATE TAX COMMISSION

On Writ of Certiorari to the Supreme Court of the State of Michigan

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BRIEF FOR STATE TAX COMMISSION

I

Opinions Below.[*]

The opinion of the court below is officially reported as *Joy Oil Company, Ltd., v. State Tax Commission*, 321 Mich. 335.

It should also be noted that the record of the State Tax Commission, filed in the court below by the officer having custody thereof, pursuant to Michigan Court Rule No. 60, § 6, included a "photostatic copy of File No. 306,985, Wayne County (Circuit Court in) Chancery" (28, see lines 9 and

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

10 from top), *viz.*, the trial court file in the cause of *Charles E. Austin, Inc., v. Secretary of State*, 321 Mich. 426; certiorari denied by this Court in No. 224, October Term, 1948.[1]

We, therefore, respectfully submit that we should be free to refer to the related, if not companion, case of *Austin* as our authority for certain factual statements.[2]

II

Jurisdiction.

We accept the jurisdictional statement of counsel for petitioner.

III

Counter-Statement of the Case.

We deem it necessary to correct a few inaccuracies and omissions in the statement of the other side (Court Rule No. 27, par. 4).

1. Counsel's statement of the case, brief, pp. 2-4, is based largely upon the 'Concise Statement of Procedure and

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[1]

The two cases, though not consolidated, were submitted to the Michigan Supreme Court on the 6th and 7th days of April, 1948, and they were decided May 18 (Joy Oil) and June 14 (Austin) of that year.

[2]

This should be in order for the further reason that the report (16-20) of the tax examiner, refers repeatedly to the Austin record and draws therefrom certain undisputed facts which doubtless influenced the State Tax Commission in making its final order.

Facts' (3-4) which formed a part of his application (1-2) for leave to appeal from the administrative order of the State Tax Commission, to the Michigan Supreme Court.

Such a statement, however, constitutes no part of the record of that commission, which was reviewed by the court below,[3] and it therefore possesses little, if any, probative force.

It might, therefore, prove helpful to explain precisely what procedural steps led to a judicial review of the final order of the State Tax Commission, bearing in mind that since the printed record does not contain any transcript of testimony relating the facts in detail, we must depend upon findings (16-20) of the commission's tax examiner.

Such procedural steps, chronologically arranged, were as follows:

June 7, 1947, the Joy Oil Company, Ltd., petitioner herein,

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[3]

Michigan Court Rule 60, § 6, provides (so far as pertinent here):

"Sec. 6. To obtain leave to appeal to the Supreme Court from an order or award of the department of labor and industry or to review the action of any other administrative board, . . . the appellant shall . . .:

(a) File in the Supreme Court an application for leave to appeal, setting out the reasons and grounds of appeal, accompanied by the original record, certified as correct by the officer having custody of the original, with supporting brief.

The certified record shall include all documents, files, pleadings, testimony, opinions of the board or officer, except such as may be summarized or omitted in whole or in part by stipulation of parties.

The certified record shall be separate from the petition for leave to appeal . . ."

filed with the Michigan state tax commission,[4] a written complaint (13) which constituted an appeal[5] from an assessment made by the City of Dearborn, Wayne County, Michigan, on certain personal property described in the complaint as "gasoline stored in a bulk plant pending transshipment to Canada".[5a] The reason for appeal was stated to be "that commodities in foreign commerce coming temporarily at rest in Michigan pending trans shipment to a foreign country are not subject to local taxation", and that such an assessment contravenes the Export Clauses of the Federal Constitution, Article 1, § 9 (5), and § 10 (2).

June 10, 1947, the secretary of the commission notified (14) the Dearborn board of assessors of such appeal, requested that no taxes be spread against the present assessed value of the property until the commission's investigation had been completed, and stated that statutory notices of hearing would later be served; a carbon copy of this communication was forwarded to counsel for the owner (15).

October 24, 1947, the secretary of the commission notified the interested parties that a review of such assessments had been ordered, and that a hearing was scheduled on October 31, 1947, at 10:00 a. m., in room 1302, Michigan Detroit Office Building, in the city of Detroit (16).

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[4]

Created by Act No. 360, Pub. Acts Mich. 1927, 1 Comp. Laws Mich. 1929, § 3710 et seq., Stat. Ann. (Henderson) § 7.631 et seq.

[5]

Such a review is authorized by the Michigan General Property Tax Law, § 152, 1 Comp. Laws Mich. 1929, § 3547, Stat. Ann. (Henderson) § 7.210.

[5a]

The personal property tax here in question was assessed under the Michigan General Property Tax Law, Act No. 206, § 8, Pub. Acts 1893, as amended, 1 Comp. Laws Mich. 1929, § 3396, Stat. Ann. (Henderson) § 7.8.

Following such a hearing, at which there was no dispute as to the facts (28, bottom of page), a tax examiner of the commission made a report (16-20) in which, pursuant to instructions from the State Tax Commission, he set forth 'a thorough analysis of this matter'.[6]

Nov. 12, 1947, an assistant attorney general advised the State Tax Commission that, in his opinion (6-10), the City of Dearborn "is not precluded from collecting a tax from (sic) the gasoline in question because of the export clause of the Federal Constitution" (10).

Dec. 3, 1947, in a letter addressed to petitioner's counsel, the secretary of the commission notified the Joy Oil Company, Ltd., that, after investigation and after giving due consideration to all reports and statements submitted at the hearing held in Detroit October 31, 1947, the commission had denied the company's appeal, "it appearing to the commission that the assessment has been made in compliance with law" in accordance with the opinion of the assistant attorney general (5).

Dec. 15, 1947, the petitioner applied (1-2) for leave to appeal from the foregoing order of the commission, such application, under Michigan Court Rule 60, § 6, *supra* (note 3), being based on the certified records of the Michigan Tax Commission, including the file in the case of *Austin*.

Jan. 8, 1948, the court below granted such leave to appeal (11-12).

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[6] We are informed by the secretary of the commission, and we state it for what it is worth, that hearings of this nature (except where the City of Detroit is involved) are quite informal and that a court reporter or public stenographer is seldom present.

2. Counsel states, brief, p. 2, that the bulk plants in which the gasoline was stored, were "leased by the Joy Oil Company, Ltd., . . . within the city of Dearborn", and that this company is "a Canadian corporation not authorized to do business in the State of Michigan", and that it owns no property within that state, except the gasoline so stored in the bulk plants at Dearborn.

This overlooks the finding of fact (17) that petitioner, though a Canadian corporation doing no business in Michigan, is "controlled by one Charles E. Austin, although the latter owns no stock in the corporation, the stock being held by Mrs. Margret Austin, wife of Charles E. Austin. There is no doubt, however, that Mr. Austin is the guiding hand in the prosecution of this business".

It is also permissible, we think, to consider the following undisputed fact revealed in the court's opinion filed in the case of *Charles E. Austin, Inc., v. Secretary of State*, 321 Mich. 426, 430:

> ". . . Charles E. Austin, Inc., is a Michigan corporation with an authorized capital of $10,000. The sole shareholder is Margret P. Austin, the wife of Charles E. Austin, who holds all of the stock as trustee for her children. She is also president and secretary of the company. It is engaged in the wholesale gasoline business in the city of Detroit. . . . The Joy Oil Company, Ltd., obtains gasoline from suppliers in Michigan and, also, by railroad tank cars from outside the state of Michigan. When the gasoline was shipped by rail to Detroit it was stored in the tanks leased by it from Margret P. Austin, pending trans-shipment by boat to Canada. For further detailed facts, see *Joy Oil Company, Ltd., v. State Tax Commission*, ante, 335".

3. On page 3 of his brief, first paragraph, counsel for petitioner points out that at the time of purchase from the Midwest Refineries, the Joy Oil Company, Ltd. furnished the seller

> "an Exemption Certificate, duly sworn to, and also a Temporary Exemption Certificate, Form 798 U.S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufacturers Excise Tax, and (b) to the carrier in compliance with the Federal Railroad Transportation Act (4)x".

He also states that the gasoline was transported "upon export bills of lading marked 'For export to Canada'", but it should be noted, we think, that while the uniform straight bill of lading (23) bore the phrase "For export to Canada", the designated destination was "Joy Oil Co., Ltd., c/o Miller Road Terminal, . . . Detroit", and that no Canadian port of entry was named in the bill of lading, nor was the shipment consigned to any person in any village, town, or city in the Dominion.

4. We would add that at a hearing before the Dearborn board of review Mr. Austin (17)

> "appeared in person and admitted the existence of approximately 1,680,000 gallons of gasoline in three or four tanks located at the Miller Terminal in Dearborn. His testimony has further brought out the fact that this gallonage has been accumulated over a fifteen-month period from January, 1946, during which period slightly over 10% of the gasoline was drawn out for export to Canada. It was further pointed out at the aforementioned hearing that of the four gasoline storage tanks located at Miller Terminal in Dearborn the

gallonage in Tank 2 which contained 108,000 gallons on April 1 was subject to taxation, the latter not having been earmarked by Mr. Austin for trans-shipment to Canada".

5. The court below found from the record that the gasoline was held in the tanks at Dearborn, prior to final shipment by boat to Canada, for approximately 18 months. 321 Mich. 338. The record discloses that fact (25).[7]

Since this Court is bound thereby, *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, we respectfully invite careful consideration of the clear and concise statement of the facts made by the Michigan Supreme Court in its opinion, 321 Mich. 337, 338.

IV

Question Presented.

Whether a large quantity of gasoline delivered intrastate to a Canadian corporation within a Michigan taxing unit and there held in storage, in the circumstance of this case, for upwards of 15 months, is in such continuous transportation in foreign commerce as to exempt it from local state-municipal taxation by virtue of the Import Export Clause of Article I, § 10, of the Constitution of the United States.

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[7]

The gasoline had been stored in Dearborn about 15 months when on April 1, 1947, the city assessed it for the ad valorem tax. Shipment to Canada by boat did not commence until July 1, 1947, and it is apparent from the Canadian customs warehouse entries (25) that final shipment was made August 22, 1947.

V

Summary of the Argument.

It is our position that on April 1, 1947, the date of assessment, the gasoline stored in tanks at Dearborn, was not a commodity in foreign commerce but formed a part of the mass of property within the state subject to such taxation:

1. Such personal property, the product of the state, had never actually started in the course of continuous transportation to Canada, either by its surrender to a common carrier, or by marking the bills of lading "For export to Canada" (a self-serving declaration); and its storage for 15 to 18 months, an unreasonable length of time, formed no part of that continuity of transportation essential to designate a commodity as "in foreign commerce"; therefore, the authorities cited in petitioner's brief, p. 5,

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;

Texas & N.O. R. Co. v. Sabine Tram Co., 227 U. S. 111;

Railroad Commission v. Worthington, 225 U. S. 101;

A. G. Spalding & Bros. v. William H. Edwards, 262 U. S. 66;

Builderup v. Pathe Exchange, 263 U. S. 291; and

Carson Petroleum Co. v. Vial, 279 U. S. 95,

do not control.

2. Although, to paraphrase the language of the opinion in the *Richfield Case*, 329 U. S. at 76, 78, 79, the Import-Export Clause prohibits every State from laying "any" tax on imports or exports without the consent of Congress, and while it is thus distinguished from the Commerce Clause in that it is not subject to limitations set by the Court upon the latter, "the questions remain whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it", id., p. 78; and what the Court said in *Coe v. Errol*, 116 U. S. 517, and in other cases cited in *Richfield*, and in others mentioned below, is deemed by this Court "to be the correct principle governing exports: '. . . goods do not cease to be part of the general mass of property in the State, subject as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey' ", *id.*, p. 79.

Brown v. Houston, 114 U. S. 622;

Diamond Match Co. v. Ontonagon, 188 U. S. 82;

American Steel & Wire Co. v. Speed, 192 U. S. 500;

General Oil Co. v. Crain, 209 U. S. 211;

Cf. *Carson Petroleum Co. v. Vial*, 279 U. S. 95;

Bacon v. People of the State of Illinois,
227 U. S. 504;

Susquehanna Coal Co. v. South Amboy,
228 U. S. 665;

Independent Warehouses, Inc. v. Scheele,
331 U. S. 70.

3. Bearing in mind the close relationship between the Joy Oil Company, Ltd., a Canadian corporation, Charles E. Austin, Inc., a Michigan corporation, Margret P. Austin, the wife of Charles E. Austin, and Charles E. Austin, individually, their previous transactions as disclosed in the case of *Charles E. Austin, Inc., v. Secretary of State*, 321 Mich. 426, together with other circumstances marking their control of the tanks in which the gasoline was stored, and applying the controlling principles of the *Richfield Case*, we respectfully submit that the City of Dearborn was not precluded from imposing the tax in question.

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69.

VI

The Argument

Question summarized:

Is personal property subject to local state-municipal taxation when delivered intrastate to a purchaser within the taxing unit and there held in storage, in the circumstances of this case, for upwards of 15 months prior to final shipment to Canada?

As appears from our summary of the argument, we contend that when the non-discriminatory general *ad valorem* tax here in question was assessed by the City of Dearborn, the gasoline which had been stored in tanks at the waterfront of the Detroit River for over 15 months, was not a commodity 'in foreign commerce' within the meaning of the Import Export Clause of the Constitution of the United States.

Point One

The gasoline had not ceased to be part of the general mass of property in the State, and the authorities cited in petitioner's brief, do not control.

The substance of petitioner's argument is that the rail shipment of the gasoline to water's edge of the Detroit River and international boundary line, on bill of lading marked "For export to Canada", followed by its storage in tanks leased to the owner at that point, and its final shipment by boat to Canada, after the lapse of 15 to 18 months, took such goods out of the general mass of property in the State, and together constituted one continuous transportation in foreign commerce. The fault in the argument lies, we think, in its premises, and the decisions of this Court cited in its support may readily be distinguished. A few of such illustrative cases will be considered here.

The shipment of lumber in the case of

> *Texas & N.O.R.R. Co. v. Sabine Tram Co., supra,*
> 227 U. S. 111, 115,

was continuous intrastate from an inland point to a dock near Sabine, Texas, where it "was unloaded from the cars into water of the slip in reach of ship's tackle, ready for loading onto ships. The Sabine Tram Company had no connection with this further carriage or switching of the lumber to the docks after its arrival at the station of Sabine". All the lumber "was in fact unloaded from the cars . . . into the (railroad company's) slips, or upon its docks, in reach of ship's tackle and loaded into the ships previously chartered for the purpose, . . . which steam

ships carried same thence to Europe, where this lumber was applied upon contracts for sale in Europe made before the lumber began to leave Ruliff", id., p. 117. None of the lumber remained in the slip at Sabine, or on the docks, except for the time necessary to await the arrival of the particular ship which had previously been chartered and designated to carry that particular lumber to Europe.

The Court, holding that the lumber destined for export acquired the character of foreign commerce as soon as it actually started for its destination, because of the continuous line of shipments through the same port to foreign ports, showing a continuity of transportation, drew marked lines of distinction, 227 U.S. 125, between the case of *Sabine*, the analagous case of *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, and the case of *Coe v. Errol*, 116 U.S. 517, on which we here rely, and which later guided this Court in formulating the principles which controlled

Richfield v. State Board of Equalization,
329 U.S. 69.

The same distinction lies between the case of *Sabine*, *supra*, and the case at bar, and it underlies all of the decisions cited in petitioner's brief.

One of those decisions, for which a great deal is claimed,

A. G. Spalding & Bros. v. Edwards, 262 U.S. 66,

was based primarily on the fact that the merchandise had been committed to a carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. And it did not matter that the title to the goods was in a corporation who might

"change their mind and retain" the goods for their own use, because there was not the slightest probability of any such change and it did not occur. "Theoretical possibilities may be left out of the account", said the Court.

Although the Court, in

Carson Petroleum Co. v. Vial, 279 U.S. 95,

held that the continuity of the journey in transporting oil from interior points to storage tanks for export by ship was not broken by such storage, the commodity in that case, unlike the case at bar, was all bought and held to fill foreign orders previously received; none of it was or could be otherwise disposed of at the port, and "the storage was but a necessary means of securing *prompt* transshipment". Moreover, the oil in the *Carson* case was stored at a port where the only business conducted was the unloading of oil from railroad tank cars into the storage tanks and the loading of the oil from the storage tanks aboard the tankers for shipment to foreign ports; and the oil was of a higher grade of gasoline than is used in this country generally, and was made especially for export, because the automobiles in England, France and other foreign countries required a higher grade of gasoline than that which was used in this country; none of which factors is present in the case at bar.

In the case at bar, the gasoline, a product of the state of Michigan, was never actually started in the course of continuous transportation to Canada; it was not surrendered to a common carrier for that purpose, and the phrase "For export to Canada", written on the bill of lading by the shipper or the consignee, did not bind the railroad to deliver the commodity in Canada; indeed, it bound no person other

than the Joy Oil Company, Ltd., its officers or those directly in charge of the storage tanks. We respectfully submit that this was merely a self-serving declaration of an interested party whose mind was subject to change at any point in the lengthy period of time during which the gasoline was stored at Dearborn.

Furthermore, the gasoline was stored in the leased tanks for an unreasonable period of 15 to 18 months before it was finally shipped to Canada. Certainly, the fact that the Detroit River is frozen over during a few weeks of the Winter months, was no excuse for the delay.

We respectfully submit that the distinctions between the transactions involved at bar, and those considered by the Court in the cases upon which petitioner relies, are crystal-clear.

Point Two

The Richfield case, and others cited in that opinion, as well as similar decisions mentioned in this brief, determine the correct principles governing exports.

We realize, of course, that unlike taxing measures said to run afoul the Commerce Clause, the constitutional prohibition against "any" tax on exports, found in the Import-Export Clause, cannot be read as containing an implied qualification which might require interstate commerce to "pay its way",

Richfield v. State Board of Equalization, supra,
321 U. S. 69, 78.

Each party at bar relies on the case of *Richfield*, the petitioner for the reason that a state tax on certain California oil products was there deemed to be in direct conflict with the Import-Export Clause, the respondent state board because we believe that the principles of that decision control.

Since the Court is so well-acquainted with the facts involved in this recent case, it would be presumptuous on our part to review them; suffice it to say for the present purpose that the correct principles there accepted as applicable to a problem arising whenever a state tax law and the Import-Export Clause come into collision, or are laid side by side for a judicial determination of which must survive, derive from a few earlier decisions of the Court cited by Mr. Justice Douglas,

Brown v. Houston, 114 U. S. 622;

Coe v. Errol, 116 U. S. 517;

Turpin v. Burgess, 117 U. S. 504;

Cornell v. Coyne, 192 U. S. 418;

Spalding & Bros. v. Edwards, 292 U. S. 66;

and other cases cited in our summary of the argument.

The broad rule laid down in the case of *Coe v. Errol, supra*, and accepted by this Court in *Richfield*, was stated thus:

> "'. . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey'". 116 U. S. 527; 329 U. S. 79.

Or, as in *Cornell v. Coyne, supra*, and stating it another way, see 329 U. S. 79:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attached to the export and not to the article before its exportation". 192 U. S. 427.

Turning to the facts in *Richfield*, and bearing in mind the controlling principles, we find many distinctions between the situation in that case and the facts in the case at bar. This is clearly shown when we consider the following excerpt from the opinion of Mr. Justice Douglas (329 U. S. 82-83):

> "The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true . . . that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain".

The contrast is almost startling. In the present case, delivery was not made into the hold of the vessel at the dock, but after delivery to the vendee, the commodity was held in storage for 18 months in all, for 15 months before the tax was imposed, during which lengthy period of time the owner of the gasoline enjoyed the hospitality of the State of Michigan and had the protection of her police and the fire department and police of the City of Dearborn. Although, in the case at bar, control was in a foreign purchaser, the Canadian corporation, there was, again to paraphrase the language of Mr. Justice Douglas, something equivocal in the course of events, if not the initial transaction, which created a probability that the oil might be diverted to domestic use.

Point Three

Applying these principles to the situation here involved, the City of Dearborn was not precluded from imposing the tax in question.

In the case at bar the gasoline had not been shipped in a continuous journey for export, or entered with a common carrier for transportation, or started upon such transportation in a continuous route or journey. It had, in fact, come at rest within the taxing unit for a period of 15 months or more prior to tax day, April 1, 1947, and did not continue its journey until about three months thereafter. During such time, we respectfully submit, it became and was (or continued to be), while in storage, a part of the general mass of the property in the State, and subject to taxation in the usual way.

If an interstate movement (ergo, an export) has not begun, the mere fact that such a movement is contemplated

does not withdraw the property from the State's power to tax it,

Minnesota v. Blasius, 290 U. S. 1.

By way of analogy (applying the rule to interstate commerce):

> "The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. . . . In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change the destination, the agency by which the transit is effected, the *actual continuity* of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied." [Italics, ours]

Champlain Realty Co. v. Brattleboro, 260 U. S. 366.

In the instant case the property had come to rest in the City of Dearborn, and, at the time of levying the tax, had not been in actual continuity of transportation.

The petitioner presents the argument that the bills of lading upon which the gasoline was shipped showed that the gasoline was destined to be exported to Canada, and

thereby the transaction became one involving foreign commerce, but it should be pointed out that the bill of lading on which a part of the property was shipped showed as its destination Detroit, Michigan, not Toronto, Ontario, or any other place outside of Michigan.

The petitioner was the purchaser and also the consignee of the shipment within the State of Michigan, and on delivery of the gasoline at the place of storage in the City of Dearborn to the petitioner, it was optional with the petitioner whether promptly to ship the gasoline to itself in Canada, or leave it within the State of Michigan for an indefinite period of months, subject only to its convenience and profit—and it chose the latter course. The bill of lading was not a through bill of lading from Alma, Michigan, to Toronto, Canada, but its force and purpose ended when the gasoline was delivered to the consignee, petitioner herein, and placed in storage in petitioner's tanks and under its control in the City of Dearborn. There was no showing that petitioner could not obtain cars to re-ship the gasoline or could not have continued the shipping of the gasoline in the original cars from Alma to Toronto. Having for petitioner's own purpose brought the shipment at rest in his leased tanks in Dearborn, where it was held for approximately fifteen months, we contend the gasoline had not yet taken on the status of a commodity in foreign commerce to exempt it from local taxation.

The petitioner also relies somewhat on

Von Hamm Young Co. v. San Francisco,
29 Cal. 2d 978, 178 P. 2d. 151 ALR 274,

in which case it appears that an interruption of foreign transit resulted from "lack of facilities for immediate transportation", which exempted the cargo from local taxa

tion, but such are not the facts in the case at bar. Here, in the Spring of 1946, the petitioner had been refused further movement of the gasoline over the international bridge by the determination of policy by the persons in control of the Ambassador Bridge and on tax day, April 1, 1947, claimed inability to charter ships for continuance of transportation by water. There was one other mode of transportation left available for the petitioner, which was by rail through the tunnel or across on the ferry between Detroit and Windsor, Canada. If the gasoline market in Canada had been high enough to warrant it, petitioner might have re-shipped the gasoline by rail, but it was to its advantage to keep it in storage in the Dearborn tanks until suitable transportation facilities were available. The available mode of transportation of the gasoline was rejected by Joy Oil as being too expensive, and the gasoline was stored until a ship was chartered by plaintiff and shipment continued from place of storage during July, 1947, to Toronto. We, therefore, contend that until the gasoline was taken out of storage in the Dearborn tanks, it had not become a commodity in foreign commerce, and was therefore subject to the local Dearborn tax.

VII

Conclusion.

For the reasons assigned in this brief, we respectfully submit that the court below was correct in holding that under the circumstances of the case at bar, there was no continuity of transportation from the point of shipment to destination in foreign commerce, and that the gasoline in Dearborn on April 1, 1947, was subject to ad valorem tax. And that the judgment of the Supreme Court of the State of Michigan should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix 'A'

The Michigan General Property Tax Act

Act 206 of the Public Acts of Michigan, 1893, amended by Act 231 of the Public Acts of 1943, (Sec. 3389 Compiled Laws of Michigan, 1929; Sec. 7.1 et. seq. M. S. A.).

Sec. 1. The People of the State of Michigan enact, That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.

Sec. 1(a). This Act shall be known and may be cited as "The General Property Tax Act".

Sec. 8. For the purpose of taxation, personal property shall include: (1) All moneys; (2) All annuities and royalties; (3) All goods, chattels and effects within the State. * * * (13) All other personal property not herein enumerated and not expressly exempted by law.

Sec. 14. (8th). Personal property of non-residents of the State, and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be to the person, persons, or corporations having control of the premises, store, mill, dockyard, piling ground, place of storage, or warehouse where such property is situated in such township on the second Monday of April of the year when the assessment is made. * * *